

Supreme Court, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
October Term, 1975.

No. **75-5421**

Parcel I.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,
against

WILLIAM T. MORRIS, JR., MARY BERENICE McCALL, THOMAS
Q. MORRIS, M. D., FINECAP REALTY COMPANY, a partner-
ship, LINCOLN SAVINGS BANK OF BROOKLYN,
Defendants,

Relative to acquiring certain real property situate in the City of
Yonkers, County of Westchester, State of New York.

Parcel II.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,
against

DAB-O-MATIC CORP. and GAZETTE PRESS, INC.,
Defendants-Appellants,
and

WILLIAM T. MORRIS, JR., MARY BERENICE McCALL, THOMAS
Q. MORRIS, M. D., FINECAP REALTY COMPANY, a partner-
ship, LINCOLN SAVINGS BANK OF BROOKLYN, CLOVER
WIRE FORMING CO., INC., WOODHAVEN DRESS CO., INC.,
Defendants,

Relative to acquiring certain real property situate in the City of
Yonkers, County of Westchester, State of New York.

Index No. 7296/73.

Parcel III.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,
against

WILLIAM T. MORRIS, JR., MARY BERENICE McCALL, THOMAS
Q. MORRIS, M. D., FINECAP REALTY COMPANY, a partner-
ship, LINCOLN SAVINGS BANK OF BROOKLYN, JOHN
JOHNSON, J. BEST, S. WATLINGTON and RICHARD R.
EARLS,
Defendants,

Relative to acquiring certain real property situate in the City of
Yonkers, County of Westchester, State of New York.

(Continued on Back of Cover)

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,
against

LESTER WEINBERG, individually and doing business as
GREAT EASTERN METAL PRODUCTS Co.,
Defendant-Appellant,

Relative to acquiring certain real property situate in the City of
Yonkers, County of Westchester, State of New York.

Index No. 7357/73.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,
against

MARY BARCA as executrix of the Last Will and Testament of
THOMAS BARCA, NANCY BARCA and ANGELO BARCA, JR.,
all doing business as BARCA BROS.,
Defendants-Appellants,
and

The COUNTY TRUST COMPANY as Executor under the Last Will
and Testament of MAITLAND BRENHOUSE, deceased,
Defendant,

Relative to acquiring certain real property situate in the City of
Yonkers, County of Westchester, State of New York.

Index No. 7326/73.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

JURISDICTIONAL STATEMENT.

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against

WILLIAM T. MORRIS, JR., MARY BERENICE MCCALL, THOMAS
Q. MORRIS, M. D., FINECAP REALTY COMPANY, a partner-
ship, LINCOLN SAVINGS BANK OF BROOKLYN,
Defendants,

Relative to acquiring certain real property situate in the
City of Yonkers, County of Westchester, State of New
York.

Parcel II.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,
against

DAB-O-MATIC CORP. and GAZETTE PRESS, Inc.,
Defendants-Appellants,
and

WILLIAM T. MORRIS, JR., MARY BERENICE MCCALL, THOMAS
Q. MORRIS, M. D., FINECAP REALTY COMPANY, a partner-
ship, LINCOLN SAVINGS BANK OF BROOKLYN, CLOVER WIRE
FORMING Co., Inc., WOODHAVEN DRESS Co., Inc.,
Defendants,

Relative to acquiring certain real property situate in the
City of Yonkers, County of Westchester, State of New
York.

Index No. 7296/73.

Jurisdictional Statement.

Parcel III.

YONKERS COMMUNITY DEVELOPMENT AGENCY,

Plaintiff-Respondent,

against

WILLIAM T. MORRIS, JR., MARY BERENICE MCCALL, THOMAS Q. MORRIS, M. D., FINECAP REALTY COMPANY, a partnership, LINCOLN SAVINGS BANK OF BROOKLYN, JOHN JOHNSON, J. BEST, S. WATLINGTON and RICHARD R. EARLS,

Defendants,

Relative to acquiring certain real property situate in the City of Yonkers, County of Westchester, State of New York.

YONKERS COMMUNITY DEVELOPMENT AGENCY,

Plaintiff-Respondent,

against

LESTER WEINBERG, individually and doing business as Great Eastern Metal Products Co.,

Defendant-Appellant,

Relative to acquiring certain real property situate in the City of Yonkers, County of Westchester, State of New York.

Index No. 7357/73.

YONKERS COMMUNITY DEVELOPMENT AGENCY,

Plaintiff-Respondent,

against

MARY BARCA as executrix of the Last Will and Testament of Thomas Barca, NANCY BARCA and ANGELO BARCA, Jr., all doing business as Barca Bros.,

Defendants-Appellants,

and

The COUNTY TRUST COMPANY as Executor under the Last Will and Testament of Maitland Brenhouse, deceased,

Defendants,

Relative to acquiring certain real property situate in the City of Yonkers, County of Westchester, State of New York.

Index No. 7326/73.

ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK.

(a) Opinions Below.

The opinion of the Court of Appeals of New York State which is unpublished as of the time of this writing is set forth in the Appendix, *infra*, pages 1a-10a. The opinion and dissenting opinion in the Appellate Division, Second Department, are reported at 45 A. D. 2d 889, 357 N. Y. S. 2d 887, and are set forth in the Appendix, *infra*, pages 11a-15a. The opinion of the Special Term of the Supreme Court, Westchester County, is not reported and is set forth in the Appendix, *infra*, pages 16a to 20a.

(b) Statement of Proceedings.

(b)(i) The proceeding is one to condemn defendants' real property by virtue of the power of eminent domain. The proceedings were brought under the Condemnation Law of the State of New York (Book 9A of McKinney's Consolidated Laws). Separate judgments were made and entered in each of the three proceedings taking the various properties, without a trial or hearing or evidentiary proceeding of any kind, although the defendants had raised, both by general denial and affirmative defenses, the issue of unconstitutionality of the taking. Since the entry of the judgments the three proceedings have been consolidated. Even before the taking accomplished by the three judgments, the plaintiff purported to take title to defendants' properties by compliance with §555, subdivision 2, the General Municipal Law of the State of New York.

(b)(ii) The order of affirmance in the New York Court of Appeals is dated July 10, 1975. The original judgments of condemnation at Special Term are dated October 23, 1973, October 23, 1973, and October 24, 1973, respectively. The order of affirmance and the three judgments affirmed are reproduced at length in the appendix. The notice of appeal was dated and mailed August 13, 1975. It was received by the Clerk of the County of Westchester on August 15, 1975, and by the Clerk of the Court of Appeals of the State of New York on August 18, 1975. The notice of appeal is set forth in the appendix.

(b)(iii) Jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(2).

(b)(iv) Cases believed to sustain the jurisdiction are the following:

Amen v. Dearborn, 363 F. Supp. 1267;
Bell v. Bierson, 402 U. S. 535;
Berman v. Parker, 348 U. S. 326;
Brest v. Jacksonville Expressway Authority, 194 So. 2d 658, aff'd 202 So. 2d 748 (Fla.);
Brown v. United States, 263 U. S. 78;
Bush Terminal v. City of New York, 282 N. Y. 306;
Carmichael v. Southern Coal and Coke Co., 301 U. S. 495;
Cincinatti v. Vester, 281 U. S. 439;
Cole v. LaGrange, 113 U. S. 1;
Commissioners of Tippecanoe County v. Lucas, 93 U. S. 1;
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Courtesy Sandwich Shop v. Port of New York Authority, 17 A. D. 2d 590, 237 N. Y. S. 2d 820, rev. on other grounds 12 N. Y. 2d 379, 240 N. Y. S. 2d 1;
Matter of Deansville Cemetery Association, 66 N. Y. 569;
Denihan Enterprises v. O'Dwyer, 302 N. Y. 451;
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Faranda Appeal, 490 Pa. 295, 216 A. 2d 769;
Fifth Ave. Coach Lines, Inc., v. City of New York, 11 N. Y. 2d 342, 229 N. Y. S. 2d 400;
Freedman v. Maryland, 380 U. S. 51;
Fuentes v. Shevin, 407 U. S. 67;
General Petroleum Corp. of California v. Hobson, 23 F. 2d 349;
Goldberg v. Kelly, 397 U. S. 254;
Golden Dawn Shops v. Redevelopment Authority, 282 A. 2d 395 (Pa.);
Hairston v. Danville and Western Rwy. Co., 208 U. S. 598;
Kings County v. Farr, 7 Wash. App. 600, 501 P. 2d 612;
Ledford v. Corps of Engineers, 500 F. 2d 26;
Loughran v. United States, 317 F. 2d 896;
Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239;
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Matter of Niagara Falls and Whirlpool Railway Co., 108 N. Y. 375;
New York City Housing Authority v. Muller, 270 N. Y. 33;
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Philips v. Foster, 215 Va. 543;
Pocantico Water Works v. Bird, 310 N. Y. 249;
Redevelopment Authority v. Owners or Parties in Interest, 1 Pa. Commonwealth 378, 274 A. 2d 244;
Rindge v. County of Los Angeles, 262 U. S. 600;
Schroeder v. New York, 371 U. S. 208;
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United States v. Certain Real Estate, 322 F. 2d 139;
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United States v. Two Tracts of Land, 387 F. Supp. 319;
United States v. 2,606.84 Acres of Land in Tarrant County, 309 F. Supp. 887;
United States v. 5816 Acres of Land, 478 F. 2d 1055;
Washington ex rel. Oregon R & N Co. v. Fairchild, 224 U. S. 510;
Wisconsin v. Constantineau, 400 U. S. 433.

(b)(v) This appeal calls into question the validity of the following since the same are repugnant to the Constitution of the United States:

1. Section 555, subdivision 2, of the General Municipal Law of the State of New York (Book 23 McKinney's Consolidated Laws).

2. Article 18, §1, and Article 18, §2, of the New York State Constitution as the same have now been interpreted by the New York State Court of Appeals.

3. Rule 3212 of the Civil Practice Law and Rules of the State of New York, as the same is written and also as the same has been interpreted by the New York Court of Appeals.

4. Sections 4 and 11 of the Condemnation Law of the State of New York (Book 9-A of McKinney's Consolidated Laws) as the same have been interpreted by the New York State Court of Appeals.

5. Article 8, §1, of the New York State Constitution as the same has been interpreted by the New York State Court of Appeals.

6. City of Yonkers City Council Resolution #265-1972 dated June 27, 1972.

7. Resolution of the Yonkers Urban Renewal Agency #55-1972 dated August 3, 1972.

8. Resolution of the Planning Board of the City of Yonkers entitled "Resolution-1972-Urban Renewal" dated August 14, 1972.

9. City of Yonkers City Council Resolution 363-1972 dated September 26, 1972.

All of these statutes and resolutions were sustained as valid by the New York State Court of Appeals.

(c) Questions Presented.

The defendants urge that the proceedings here involved and the laws, statutes and resolutions under which they were conducted violate the due process clause and equal protection clause of the Fourteenth Amendment of the United States Constitution. The specific questions are as follows:

I. Section 555, subdivision 2, of the General Municipal Law of the State of New York is unconstitutional, in that it provides for the acquirement of absolute title in fee to real property, by a condemnor, by its deposit in court of a sum of money which, in the sole discretion of the condemnor, is adequate compensation to the condemnee, without any judicial determination on the question of whether the condemnation is for a public purpose and public use, and therefore whether the condemnation is permissible under law.

II. That the dominant, and virtually sole, purpose behind the instant exercise of the right of eminent domain was to acquire real property for the erection by the Otis Elevator Company of manufacturing facilities thereon, and to enable the plaintiff, by the improper use of the machinery of urban renewal, to make an unlawful gift of public money and public property to the Otis Elevator Company: that such taking of private property for gift to a private corporation, so that it can devote the property which is the subject of the gift to a use which is private, violates the Fourteenth Amendment, and so also do the statutes and resolutions authorize such a procedure.

III. In the instant proceedings, final judgments of condemnation were awarded against the defendants without a trial or evidentiary hearing of any kind on the vital

question of whether the condemnations were for a public or private purpose and use, and that such a procedure and the statutes which authorize the same violate the Fourteenth Amendment.

(d) Statement.

These proceedings under the Condemnation Law of the State of New York were commenced by the service of petitions. Defendants in these proceedings moved to dismiss all of the petitions as insufficient in law, since they failed to allege any facts tending to show the existence of a public purpose for the entire project, pursuant to which the takings were sought. Plaintiff served amended petitions which set forth City Council of Yonkers Resolution 265-1972, Yonkers Urban Renewal Agency Resolution #55-1972, a Yonkers Planning Board Resolution, and City Council Resolution 363-1972. There is still no allegation, however, having any tendency to show that any public purpose exists. In the interest of expedition defendants decided not to attack the amended petitions by a motion addressed thereto, but to do so by raising their insufficiency in the answers.

The answers deny generally the material allegations of the petitions, and plead several affirmative defenses in addition to one alleging that the petition is insufficient in law. The first affirmative defense pleads that the petition is insufficient in law in that it fails to plead facts disclosing the nature of the public purpose involved.

The second affirmative defense pleads that the dominant and primary purpose of the entire condemnation is to placate the Otis Company, and to confer a benefit thereon in service of a private purpose, to the prejudice of other commercial and business establishments, and that the denomination of the lands involved as substandard was a

subterfuge adopted to hide from the court that the true purpose of the condemnations was not a public purpose, but a private one, and that the surveys prepared by the plaintiff to prove the land taken to be substandard and blighted were inaccurate and colorable, and created to hide the fact that the taking was for a private purpose.

The third affirmative defense pleads that here involved is a gift and loan of municipal funds in violation of Article 8, Section 1, of the New York State Constitution.

The fourth affirmative defense pleads that by selecting Otis as a sponsor, in advance of the designation of the project area as an urban renewal area, and by entering a contract with Otis before such designation at a price already fixed, the plaintiff and the City of Yonkers disabled themselves in advance from complying with §§505-507 of the General Municipal Law, and from complying with Article XV thereof generally. Also pleaded is the failure of the plaintiff and the City to hold a public hearing on notice 10 days prior to the award of the contract to Otis as required by §507,2 (c) and (d) of the General Municipal Law.

The fifth affirmative defense is not here material.

The defendants moved for examinations before trial. Defendants also moved to stay the application of §555, subdivision 2, General Municipal Law, until the question of whether there was or was not a public purpose was determined. These motions were denied below, and those denials have not been disturbed on appeal.

These cases were disposed of on the pleadings without trial or hearing of any kind. Therefore defendants were confined to raising the questions now presented, by their pleadings, their affidavits, by their motions to stay the ap-

plication of §555 Subdivision 2 of the General Municipal Law, and by briefing, at all levels, the very questions now presented to this Court. By these means they did in fact raise these questions at Special Term, in the Appellate Division and in the Court of Appeals.

The plaintiff sought judgment below, without a trial or hearing, by submitting affidavits to the Court below. Article 32 of the New York Civil Practice Law and Rules provides for accelerated judgment, but only on motion by the party who seeks such judgment. No notice of motion or order to show cause was served upon the defendants by the plaintiff.

§2211 of the Civil Practice Law & Rules provides:

§2211 Application for order: when motion made

A motion is an application for an order. A motion on notice is made when a notice of the motion or an order to show cause is served.

Since no motion was made, defendants were not convinced, and are not convinced that disposition by affidavits at that point was an authorized procedure. It seemed, however, that plaintiff was proceeding upon the theory that a defendant in condemnation is not entitled to a trial, on the issue of public as against private use, and should receive one only if he makes a strenuous showing of some sort. Thus the plaintiff cast upon the defendants the burden of proving that defendants should be accorded the special privilege of a trial. The Special Term adopted plaintiff's theory and placed upon defendants a very heavy burden of proof. As will be seen the Appellate Division and Court of Appeals took the same position. This shifting of the burden of proof from plaintiff to defendant is one of the constitutional issues raised

in both appellate courts below, and sought to be raised here. So also, of course, is the granting of a judgment of condemnation without trial or hearing of any kind.

Despite the fact that defendants were convinced that disposition by affidavits was not a proper procedure, to protect their position, defendant submitted a counter affidavit with voluminous exhibits, which was an affidavit of Morton N. Wekstein, dated July 20, 1973. The plaintiff's affidavits, even if used to bolster the petition, fail to disclose that there is a public purpose of a nature to justify the use of the power of condemnation. The defendants' affidavit, and the exhibits annexed thereto, establish that the dominant and virtually sole purpose of the entire project was to persuade Otis to remain in Yonkers so that its employees would not lose their jobs. Established also is the fact that the use of the words and the concepts "urban renewal" and "redevelopment" constituted a transparent device and subterfuge employed for the purpose of permitting the City and the plaintiff to make a vast unconstitutional gift of public funds to a private corporation (and to private individuals, that is to say, the employees of Otis). *Even the choice of which land was to be "redeveloped" was made by Otis and not by the plaintiff.*

From the very beginning there was no real attempt to hide the true purpose of the project, that is, to keep Otis in Yonkers. The populace and the newspapers would be astonished, even now, to learn that there is any other purpose behind the project.

The story of the present taking is a long one. During the mid-1950s the Otis Elevator Company threatened to move its entire operation from Yonkers unless it gained title to certain public streets (77). This threat was successful and Otis gained its objective. In February of 1965 Otis employed the same tactics again, with the pur-

pose of receiving a vast gift from the people of the City of Yonkers. Again Otis succeeded although this time the campaign took over eight years.

In February of 1965 Otis made a public announcement that, on or before July 1, 1965, it would move part of its operation to Bloomington, Indiana (77, 87). On March 4, 1965 the Common Council of the City of Yonkers announced that it would prevent Otis from leaving and that it, the Common Council would retain control of all concessions which would have to be made in order to keep Otis in Yonkers (77, 88-90). Then in 1969 Otis was talking about moving its entire operation to New Jersey (77, 78).

During the incumbency of two successive Mayors the City officials made strenuous efforts to appease Otis. At least three other sites were offered Otis, one of which was the Dunwoodie Golf Course, a County owned public links, and another of which was a large parcel immediately to the west of the Otis parcel, and lying between the existing Otis plant and the Hudson River. None of the three parcels could be claimed by the most starry-eyed planner to require any urban renewal treatment of any kind (78). None of the three parcels had been designated by the Yonkers Planning Board, or any other person in authority, for urban renewal treatment (78). This was a great inconvenience to all concerned in the Otis project. In the absence of the magic words "urban renewal" and "substandard" and "blighted" no reasonable pretext could be drummed up for expending City money, or any other public money upon the expansion of the Otis Elevator works.

A remarkable document was prepared by a Charles T Main of New York, Inc. at the request of and at the very substantial expense of the New York State Urban Development Corporation (with perhaps some contribu-

tion by the City of Yonkers) (78, 79, 92-96). This was a detailed feasibility study showing that the land on the west side of the Otis property was an economically desirable location for the Otis expansion. Otis rejected this westerly riverfront site. Defendants do not know, and will not know, unless they are permitted an examination before trial, what were Otis's reason for rejecting the riverfront site. Defendants are however reliably informed that Otis rejected the golf course site, because Otis felt it could not bear the expense of purchasing it, and developing it, without substantial help from the City (80).

In response to this cue the City fathers set about finding a means of furnishing substantial financial Aid to Otis. The subject parcel was then selected as the "Otis prancel." This selection was made despite the fact that this parcel had never been designated by any public body, or any public document, as land in need of even the mildest urban renewal treatment (80). It was not a mere coincidence that the land selected was contiguous with the existing Otis plant along its longer boundary. The site was a mixed area containing some older residential parcels, and a good deal of business and manufacturing property, some of which was outstanding in quality and condition.

The City fathers then deliberately and consciously set about to spend some money to prove the subject site was substandard, as a means of opening the way to subsidizing Otis. The first substantive step in this direction was the execution of an agreement between Otis and the plaintiff on June 5, 1972 (80, 81, 67-73).

Some five weeks later on August 14, 1972 a meeting of the Planning Board of the City of Yonkers was held which eventuated in the Planning Board Resolution of August 14, 1972. In support of the adoption of that resolution

the City's Planning Director said *in so many words* that the urban renewal of the "Otis" site was conceived so that the City would be able to subsidize Otis in its expansion (81, 82, 97, 98). His exact words were:

"These needs have been studied by engineers and site planners, and various agencies but without cooperation of the City through its many tools URA or Urban Development program, Otis cannot do it alone and, therefore, in the best interests of the City-at-large, URA decided to explore the possibility of acquiring property mentioned, clear and make available to Otis."

The minutes of that August 14, 1972 meeting appear in the record at pages 97-100 and demonstrate a solicitude for the needs of Otis, and include no remark, by any public official, addressed to the welfare of the land itself, or of the City at large. Mr. W. Jan Chong the plaintiff's Director of Urban Renewal said at this meeting that, in the event, the plaintiff might take less land than originally projected, and that in this matter "*a lot depends on the needs of Otis*" (98).

This same Director of the Plaintiff's operation, Mr. Chong replied to a letter of complaint by a businessman, about to be displaced, in a letter dated September 21, 1972. He, of course, was putting his best foot forward, and giving to the businessman the best possible statement of the plaintiff's purpose in taking the subject property. Not one word is included in his letter concerning the urgent need to eliminate substandard or blighted areas. The only attempted justification for the taking is contained in the following statement (101, 102);

"We must also recognize the situation that the Otis Elevator Company now has. If urban renewal activities cannot take place as scheduled, Otis will

have no alternative but to leave the City of Yonkers. This would mean a loss of 1400 jobs now, the vast majority of which are held by Yonkers residents, plus the additional 600 jobs Otis expected by 1980. The 2000 total jobs lost between now and 1980 would severely affect the economy of Yonkers."

Here is the most powerful possible admission, by the plaintiff's chief officer, that the purpose of the taking was not the rescue of distressed land, but the expansion of the Otis Elevator manufacturing facility for the benefit of the Otis company and its employees.

A further admission, this time a judicial admission is made to the same effect. Defendants moved to stay, pending appeals, the physical taking and destruction of their various buildings. Despite strenuous efforts, the defendants were unsuccessful in securing a stay pending appeal, and the buildings were demolished. Defendants efforts in this direction consisted of (1.) motions before judgment, at Special Term, to stay the operation of §555 subdivision 2 until after a determination of whether the taking was for a public purpose or a private purpose (2) motions made in the Appellate Division, Second Dept to stay the execution of the judgments of taking, pending the hearing and determination of the appeals. All of those motions were denied, and the taking and demolition of the buildings proceeded to completion. The history of these motions is important because of the plain holding, in the last paragraph of the New York Court of Appeals opinion, that defendants are estopped now to establish that the taking was for a private use because, "In the meantime, the taking has occurred without hindrance, the buildings have been demolished • • •" Defendants tried with might and main to effect a "hindrance" of the taking and demolition. It cannot be held against the defendants that two successive courts turned a deaf ear to an account of their desperate plight.

The motions for stay in the Appellate Division are important in yet another connection since during those proceedings defendant made a most damaging admission. In the affidavit of Thomas Dunn dated November 14, 1973 submitted in opposition, Mr. Dunn is described as "the Program Manager for NTD Area #4 (Otis Expansion)." On page 3 of Mr. Dunn's affidavit appears the following (page 146):

"Our schedule calls for disposition to Otis by June 30, 1974. If this is substantially delayed, Otis may abandon the project and relocate elsewhere."

By the plaintiff's own statement the project cost to the plaintiff and the City will be \$9,500,000. The total reimbursement to the City by Otis was originally stated to be \$650,000. Mr. Dunn's affidavit now says it will be \$1,300,000. Unless the plaintiff and the City have spent money foolishly, and with the greatest profligacy, the land in the project will be worth, when cleared and prepared for Otis, something approaching \$9,500,000. Mr. Dunn cites as a staggering loss to the plaintiff a possible abandonment of the project by Otis. This would mean that the plaintiff will have lost the golden opportunity to have been paid some \$1,300,000, if we accept the new figure, for land which cost the plaintiff \$9,500,000. The plaintiff will have lost its main chance of realizing, by sale, 13% of its investment. Obviously the loss of this bargain will not have injured the plaintiff. Any other sponsor will pay many times 13% of the cost (and no doubt the value) of this land. The only loss to the plaintiff and the City, of which they now at this late date complain, is the departure of Otis. It is submitted that this is demonstration, beyond a reasonable doubt, that the only purpose which exists now (and which existed originally) for the entire Otis project is the appeasement of Otis. It is not irrelevant that the entire project is en-

titled "NPD Area #4 (Otis Expansion)." This title has changed in no significant detail since long before the project area was approved for urban renewal treatment. It was always known as the "Otis" project.

The opinions of the Special Term accept totally the fact that this purpose of the entire project is to satisfy the needs of Otis with respect to "additional space." There the Court said "As an alternative, if Otis were unable to expand in the City, it would have to move its entire facility to an area where land was available. As a result, the plaintiff was consulted and the proposal which is the subject of this litigation was worked out. Thereafter, public hearings were held before the planning board and the city council and the pros and cons of the plan were discussed in detail" (p. 14).

Three things appear immediately (1) the sole motivating force for the project was the desire to facilitate the Otis expansion (2) the scheme was mature and well formed before any thought was given to whether the land was substandard (3) Otis was the accepted sponsor long before any thought was given to the question of the alleged substandardness of the land.

The Special Term held, however, that this single-minded desire to help Otis is a public purpose justifying condemnation and a gift of public property. In so holding the Court below was adopting exactly the factual contentions of the plaintiff as they were exposed in that Court.

For the first time in the Appellate Division, the plaintiff urged that there were two purposes generating the project (1) the appeasement of Otis (2) the clearing and reclamation of blighted land. It would seem that plaintiff should not now be permitted to advance a contention not made below. Let us assume, however, that there were

two purposes. Nowhere is there a finding as to which is the dominant or primary purpose, and as to which is the subordinate or ancillary purpose. Without such a finding it is impossible to assess the constitutionality or unconstitutionality of the taking.

The majority in the Appellate Division adopted the same stance as the Special Term in holding that the existence of some public benefit is enough to sustain a taking in eminent domain, whether or not the alleged public purpose is the dominant purpose. The following appears in the majority opinion, "No justiciable issue is raised on this record with respect to the claim of benefit to Otis only, as the legislative findings demonstrate at least a benefit as well to the City as a whole • • •."

Defendants never made any "claim of benefit to Otis only." That never was an issue in this case, and is foreign to the constitutional question involved. The majority in the Appellate Division avoided the central question of whether something which qualified as a public benefit was the dominant purpose, and has shifted the inquiry to whether there is some public benefit, even an incidental or peripheral one.

Also the majority has shown such excessive reverence for the legislative findings of the Yonkers City Council, that it has made those findings conclusive upon the courts. It has thus paralyzed the Courts in performing their function of deciding the matter of whether the purpose is primarily public or private. The dissent in the Appellate Division sets forth directly and clearly both of these defects in the majority opinion.

The Court of Appeals opinion is best discussed in the argument below in conjunction with the discussion of the cases, and so this paper will proceed.

I.

§555, subdivision 2 of the General Municipal Law of the State of New York is unconstitutional in that it provides for the acquirement of absolute title in fee to real property by a condemnor by its deposit in court of a sum of money which, in the sole discretion of the condemnor, is adequate compensation to the condemnee, without any judicial determination or the question of whether the condemnation is for a public purpose and public use, and therefore whether the condemnation is permissible under law.

§555 subdivision 2 of the General Municipal Law provides for a taking, before any trial or hearing of any sort, which is permanent, absolute and indefeasible. The subdivision commences, "Notwithstanding the provisions of any general, special or Local Law or charter provision applicable to the acquisition of real property by condemnation * * *." Therefore there is no need to study the Condemnation Law, or any other Law for provisions which can be read with the subdivision, so as to ameliorate its harshness. §555 subd 2 by its terms supersedes all other provisions of law where urban renewal is involved. The subdivision by its terms grants "fee simple" upon the deposit of a sum of money whose size is a matter within the unfettered discretion of the condemnor.

In the absence of emergency, it is constitutionally impermissible to appropriate or terminate a person's ownership in property without a pre-appropriation or pre-termination hearing.

Fuentes v. Shevin, 407 U. S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983;
Goldberg v. Kelly, 397 U. S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011;

Stanley v. Illinois, 405 U. S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208;
Wisconsin v. Constantineau, 400 U. S. 433, 27 L. Ed. 2d, 91 S. Ct. 507;
Schroeder v. New York, 371 U. S. 208, 9 L. Ed. 2d 255, 83 S. Ct. 279;
Sniadach v. Family Finance Co., 395 U. S. 337, 23 L. Ed. 2d 349, 89 S. Ct. 1820;
Bell v. Burson, 402 U. S. 535, 29 L. Ed. 2d 90, 91 S. Ct. 1586.

The pre-termination hearing, in order to satisfy due process, must be an evidentiary hearing, with confrontation of witnesses and cross examination.

Goldberg v. Kelly, *supra*.

Fuentes v. Shevin, *supra*, sets for the emergent situations which are exceptions to the general rule. They are for the collection of internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public against misbranded drugs and contaminated foods (32 L. Ed. 2d at 576).

All of these emergent situations, which create exceptions to the general rules, are ones where time is the crucial element. It is the need for immediate action which creates the emergency and the need for special treatment. Taking in eminent domain, in general, presents no such emergent situation. Particularly in the instant case, no legitimate government interest required haste in taking. As was seen in the statement of facts, the plaintiff opposed a stay of execution upon the ground that it would anger Otis Elevator Company so that it might leave Yonkers. Whatever else may have risen to the dignity of a public purpose, or public use, the construction of the Otis works was not a public use. Thus there was no

governmental or public requirement, so emergent that it justifies the breach in the rule, which this Court has announced to be an essential ingredient of due process of law.

Under this rule any significant property interest is protected, and even a temporary non-final deprivation is a deprivation within the meaning of the Fourteenth Amendment.

Fuentes v. Shevin, supra.

It is not permissible to inflict a wrong in violation of the constitution, on the ground that the wrong can be undone.

Stanley v. Illinois, supra;
Fuentes v. Shevin, supra.

"Since the announcement of this Court's decision in *Sniadach v. Family Finance Co.* * * *, summary prejudgment remedies have come under constitutional challenge throughout the country."

Fuentes v. Shevin, supra, 32 L. Ed. 2d at page 565, footnote #5.

It may be argued that since eminent domain is an essential tool of sovereignty, the requirements of due process of law must yield to the needs of government. The answer is that eminent domain is a field ripe for the oppression of citizens, unless the forms and substance of due process of law are rigidly adhered to. It is for these reasons that it is urged that the instant subdivision, and the procedure here followed under its aegis, violate the 5th amendment as the same is incorporated into the 14th amendment, and the due process clause of the 14th amendment. In the

instant case where the sovereign used its power to prefer one private corporation over other individuals and corporations, it is submitted there has been also a denial of equal protection of law under the 14th amendment.

II.

That the dominant and virtually sole purpose behind the instant exercise of the right of eminent domain was to acquire real property for the erection by the Otis Elevator Company of manufacturing facilities thereon, and to enable the plaintiff, by the improper use of the machinery of urban renewal, to make an unlawful gift of public money and public property to the Otis Elevator Company that such taking of private property for gift to a private corporation, so that it can devote the property which is the subject of the gift to a use which is private, violates the Fourteenth Amendment, and so also do the statutes and resolutions authorize such a procedure.

The taking of private property for other than a public purpose is a violation of due process even though adequate compensation is offered or given.

Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 25 S. Ct. 251, 49 L. Ed. 462;
Missouri Pacific Railway Co. v. Nebraska, 164 U. S. 403, 17 S. Ct. 130, 41 L. Ed. 489;
Hairston v. Danville and Western Rwy. Co., 208 U. S. 598;
Commissioners of Tippecanoe County v. Lucas, 93 U. S. 108;
Cincinatti v. Vester, 281 U. S. 439;
Nicholson on Eminent Domain (3d Ed. §4.7, 4-29, 7-1, 7-11, 7-17.

The matter of whether a condemnation is undertaken for a public purpose is a judicial question to be determined by the Courts.

Denihan Enterprises v. O'Dwyer, 302 N. Y. 451;
Matter of Deansville Cemetery Association, 66 N. Y. 569;
Matter of Niagara Falls and Whirlpool Railway Co., 108 N. Y. 375;
Pocantico Water Works v. Bird, 310 N. Y. 249;
New York City Housing Authority v. Muller, 270 N. Y. 333;
Courtesy Sandwich Shop v. Port of New York Authority, 17 A. D. 2d 590, 237 N. Y. S. 2d 820, rev. on other grounds 12 N. Y. 2d 379, 240 N. Y. S. 2d 1;
Courtesy Sandwich Shop v. Port of New York Authority, 12 N. Y. 2d 379, 240 N. Y. S. 2d 1;
Fifth Avenue Coach Lines, Inc., v. City of New York, 11 N. Y. 2d 342, 229 N. Y. S. 2d 400;
Berman v. Parker, 248 U. S. 326;
Kings County v. Farr, 7 Wash. App. 600, 501 P. 2d 612;
Washington ex rel. Oregon R. & N. Co. v. Fairchild, 224 U. S. 510;
Cincinatti v. Vester, *supra*;
United States v. Certain Real Estate, 322 F. 2d 139;
United States ex rel. Two Tracts of Land, 387 F. Supp. 319;
Amen v. Dearborn, 363 F. Supp. 1267;
United States v. Agee, 322 F. 2d 139;
United States v. Certain Real Estate, 217 F. 2d 920;
Loughran v. United States, 317 F. 2d 896;
Rindge v. County of Los Angeles, 262 U. S. 600;
In re Condemnations for the Improvement of Rouge River, 266 F. 2d 105;
Sears v. Akron, 246 U. S. 242;
United States v. 2,606.84 Acres of Land in Tarrant County, 309 F. Supp. 887;
United States v. 91.69 Acres of Land, 334 F. 2d 229;
Ledford v. Corps of Engineers, 500 F. 2d 26;

United States v. 58.16 Acres of Land, 478 F. 2d 1055;
Faranda Appeal, 490 Pa. 295, 216 A. 2d 769;
Redevelopment Authority v. Owners or Parties in Interest, Pa. Commonwealth 378, 274 A. 2d 244;
Nicholson on Eminent Domain (3d Ed.), §7.4, 7-80.

Defendants are not urging here that the character of the land taken is inappropriate for the Otis factory, or that too much is taken for the needs of the project, only that the entire project is constitutionally infirm because the taking is for a private purpose.

Curiously the following appears on page 19 of respondent's brief in the Appellate Division and also on page 19 of respondent's brief in the Court of Appeals:

"The respondent does not dispute that the question of what is a public purpose is ultimately a judicial one."

Therefore *all parties* agree that the determination as to that which is a public purpose is ultimately for the Courts and not ultimately for Congress or for any other legislative or administrative body.

Once that is so, it is impossible to find justification for a judgment of condemnation in advance of trial or hearing of any sort. The answers squarely raise the issue of whether there is or is not a public purpose, both by general denial and affirmative defense. That issue has not been resolved. It is of no consequence that various legislative and administrative determinations of various arms of the City of Yonkers are pleaded in the petition. Those determinations are entitled to respect, as are those of Congress, but are not entitled to serve as the ultimate judicial determination of the all-important question, any more than is a declaration of legislative purpose by the Congress. Ul-

timately, no matter how much politeness and deference (or how little) is granted to legislative action in this field, the courts must decide whenever the issue is raised, whether the dominant purpose of a taking is public or private, and therefore whether the taking is constitutionally permissible or not. No court has held a trial or hearing, in this case, on that all-important issue.

In *Denihan Enterprises v. O'Dwyer*, 302 N. Y. 451, where the question was whether the condemnation was for a public purpose, and specifically whether the public benefit was subordinate and incidental to a dominant private use, the Court of Appeals held:

"This is not a case to be decided on the pleadings. The constitutionality of the regulations must be decided after the facts are determined at trial."

That is precisely the principal issue in the instant case, to wit, whether the dominant or principal purpose is a public or private one.

Due process requires that the court inquire into the truth of the declaration of purpose by the legislative body involved

Loughran v. United States, supra;
United States v. 2606.84 Acres of Land in Tarrant County, Texas, supra;
Redevelopment Authority v. Owners or Parties in Interest, supra.

In *Redevelopment Authority* the condemnor asserted that once an urban renewal area is determined to be blighted, parcels within the area can be condemned without regard to the true reason for the condemnation. This contention was rejected totally by the court. It is submitted that

the New York Court of Appeals should have made the same disposition of that argument in the instant case.

As the Court of Appeals held in *Denihan Enterprises, supra*, the determination of what is and what is not a public purpose is a matter which requires a trial. Other cases so holding are

Washington ex rel. Orgeon R & N Co. v. Fairchild,
 224 U. S. 510, 32 S. Ct. 535;
United States v. 58.16 Acres of Land, supra;
Golden Dawn Shops, Inc., v. Redevelopment Authority, 282 A. 2d 395 (Pa.);
Amen v. Dearborn, 363 F. Supp. 1267;
United States v. 58.16 Acres of Land, supra.

Amen v. Dearborn relies upon *Fuentes v. Shevin, supra*, and *Sniadach v. Family Finance Corp., supra*, for the precise point that such an evidentiary hearing must be had before the taking by condemnation. So also do the defendants-appellants (and also upon the other cases cited for the same proposition in Point I hereof.) The rule of *Fuentes* and other similar cases, it is submitted, remove any possible doubt concerning the doctrine that a condemnee is entitled to an evidentiary hearing before his property is taken, and that that hearing is an essential ingredient of due process of law.

The decision of the New York Court of Appeals, in the instant case, denying defendants a trial, is especially prejudicial, because that court dispensed entirely with any factual showing, *even by affidavits*, as to the nature of the public purpose claimed by the plaintiff to exist. That purpose as found by the Court of Appeals is the elimination of substandard or blighted land. The Court of Appeals found very plainly that the plaintiff failed to ad-

duce any proof that the land condemned in the instant case was substandard. In one place the Court of Appeals found:

"The Agency has not indicated in any manner the grounds upon which it concluded that the land is presently substandard. Indeed, in its reply to defendants' claims, the Agency states that its findings in this regard are conclusive and establish a public purpose as a matter of law."

The Court of Appeals held further:

"Extensive review of the case law both in New York and in our sister states regarding the proper scope of review which courts may apply to such agency findings reveals that, even where courts stated most strongly that their role in reviewing agency findings was a circumscribed one, more was required to be submitted to the courts than the Agency has supplied here."

and then made the following holding:

"Carefully analyzed, it is clear that in such situations, courts are required to be more than rubber stamps in the determination of the existence of substandard conditions in urban renewal condemnation cases. The findings of the agency are not self-executing. A determination of public purpose must be made by the courts themselves and they must have a basis on which to do so. (*Denihan Enterprises, Inc. v. O'Dwyer, supra.*)"

The excerpted portions of the Court of Appeals opinion are antagonistic to the subsequent conclusion in the same opinion that the agency (plaintiff) is entitled summary judgment.

The only way in which the most enthusiastic proponent of this opinion can attempt to harmonize this contradiction is by espousing a new doctrine—that the condemnnee has the burden of pleading and proving that the contemplated public purpose is not a public purpose. Such a doctrine is both legally and constitutionally untenable. Yet that is what seems to have been the pathway taken by all three courts which have dealt with this case.

The New York Condemnation Law requires the condemnor to plead (and therefor to prove) "The public use for which the property is required * * *" (§4 subd. 3 Condemnation Law).

Clearly the trial court placed the burden of proof upon the defendant, and a very curious burden of proof. The defendants failed below because there is "no allegation or claim that the acts claimed are corrupt or fraudulent." This standard was borrowed from *Kaskel v. Impellitteri, supra*, where the Court of Appeals was defining the plaintiff's burden of proof in a taxpayer's action under §51 of the General Municipal Law. The defendants here are obviously not plaintiffs, and are not seeking to interfere in the administration of government as a taxpayer not specially aggrieved. In the instant case the burden of proof rests, as always, upon the plaintiff. This is doubly true where plaintiff seeks to invade a constitutionally protected right. In such case to shift in the burden of proof is constitutionally impermissible.

Freedman v. Maryland, 380 U. S. 51.

The Court of Appeals seems also to have shifted the burden of proof to the condemnnees. This is seen from its reliance upon *Kaskel v. Impellitteri*, and upon the great significance it placed upon the fact that defendants failed to prove that the subject area was not substandard.

The New York Courts have long adhered to a rule which is designed to discover which use is public and which is not public. Where the dominant purpose is public condemnation is permissible. Where the dominant purpose is private, condemnation is prohibited, even where there is an incidental purpose which confers substantial benefit upon the public.

Courtesy Sandwich Shop, Inc., v. Port of New York Authority, 12 N. Y. 2d 379, 240 N. Y. S. 2d 1;
New York City Housing Authority v. Muller, 270 N. Y. 340;
Matter of Eureka Basin Warehouse and Manufacturing Co., 96 N. Y. 42, cited with approval in *Denihan Enterprises v. O'Dwyer*, 302 N. Y. 451;
Bush Terminal Co. v. City of New York, 282 N. Y. 306.

The determination as to that which is the dominant purpose and that which is an incidental purpose requires careful examination of the facts and all of the surrounding circumstances. As the Court of Appeals held in *Bush Terminal Co. v. City of New York*, *supra*, "The factors involved are often relative, not absolute, and the test may be one of degree."

It has been held in the *Courtesy Sandwich Shop* case is that such "production of revenue" unsubordinated to a primary public purpose is an unconstitutional basis for the resort to eminent domain.

Cases elsewhere which have expressly or by clear implication adopted the same standard for assaying the nature of the purpose and use are:

Swan Lake Hunting Club v. United States, 381 F. 2d 238;

Phillips v. Foster, 215 Va. 543, 211 S. E. 2d 93;
Redevelopment Authority v. Owners or Parties in Interest, *supra*;
In re Opinion of the Justices, 204 Mass. 607, 91 N. E. 405;
General Petroleum Corp. of California v. Hobson, 23 F. 2d 349.

It is respectfully submitted that the dominant purpose test, or something very like it, is the only rational standard to be applied in discovering whether a use is public or private. We must look for the essential nature of an alleged public use, not its form and trappings.

There is no lawfully conducted business of any kind, great or small, which does not confer some benefit upon the public. All furnish commodities or services, or both, and most furnish employment for persons other than the proprietors. This is not to say that each such business constitutes a public purpose justifying the use of eminent domain for its benefit. The Otis Company is not different from thousands of other business establishments, most smaller, and some larger. It is because all businesses furnish some public benefit that it was necessary to formulate the dominant purpose rule. Otherwise all businesses would qualify for the benefits of condemnation exercised on their behalf, and incidental public benefits would be equated with public use.

Industrial and commercial use does not constitute a public use in condemnation.

Amen v. City of Dearborn, *supra*;
Brown v. United States, 263 U. S. 78 (by clear implication since it found it necessary to distinguish *In re Opinion of the Justices*, *supra*;
In re Opinion of the Justices, *supra*;
Golden Dawn Shops Inc. v. Redevelopment Authority, 282 A. 2d 395 (Pa.).

One person's property cannot be taken for the benefit of another private person without a justifying public purpose.

U. S. v. Agee, 322 F. 2d 139;
Brown v. United States, *supra*;
Redevelopment Agency v. Owners or Parties in Interest, *supra*;
General Petroleum Corp. of California v. Hobson, 23 F. 2d 349;
Hairston v. Danville and Western Rwy., 208 U. S. 598;
Nicholson on Eminent Domain (3d Ed.) 4.7.4-29 (where it is said that even such a taking is authorized by the State Constitution, it would violate the United States Constitution).

Condemnation of property which is excess to that needed for the public improvement involved for the purpose of selling it off at a profit to pay for the improvement is unconstitutional.

Cincinatti v. Vester, 281 U. S. 439.

Cases virtually identical, factually and legally, with the instant case, where the takings were found to be unconstitutional are the following:

Golden Dawn Shops Inc. v. Redevelopment Authority, *supra*;
Phillips v. Foster, 215 Va. 543, 211 S. E. 2d 93;
Redevelopment Authority v. Owners or Parties in Interest, *supra*;
Brest v. Jacksonville Expressway Authority, 194 F. 2d 658, *affd.* 202 S. 2d 748 (Fla.).

Defendants have found no contrary authority except for the holdings in the instant case. Examination of the Court of Appeals opinion in the instant case discloses

that it used a tortious path in order to achieve an unjust and unconstitutional result.

The sole public purpose found by the opinion to exist is the reclamation of blighted and substandard land. This finding is founded upon another finding that the plaintiff failed to adduce any evidence having any tendency to show that the subject property was substandard or blighted. After this huge leap the next step is easy. Since the taking is for reclamation of blighted land (never shown even by affidavit to be blighted) any use made of the land thereafter is permissible.

Waived aside entirely is the overwhelming showing by defendants that the redevelopment of blighted land, if indeed it was a purpose of the taking to any degree, was only a very incidental purpose. From the very first the Yonkers authorities were obsessed with only one purpose—to appease Otis by making it a large gift of public funds.

The City's Planning Director said in so many words "Otis cannot do it alone" and therefor it was necessary to furnish "cooperation of the City through its many tools URA or Urban Development Program" (98). No plainer statement can be made of the purpose of the taking. Urban Renewal was to be used, but only as a "tool," to enable the City to give public funds to Otis.

Therefor the dominant and all absorbing purpose of this taking was not only *not* a public purpose; it was one which is separately prohibited by the 14th amendment. Since the enactment of the 14th amendment "state taxing power can be exerted only to effect a public purpose, and does not embrace the raising of revenue for private purposes."

Carmichael v. Southern Coal and Coke Co., 301 U. S. 495;

Cole v. LaGrange, 113 U. S. 1, cited with approval in *Thompson v. Consolidated Gas Corp.*, 300 U. S. 55;

In re Opinion of the Justices, *supra*;

Phillips v. Foster, *supra*.

The Court of Appeals approved of the unconstitutional gift to the Otis company by the use of the word "sponsor." That word is an obvious misnomer when applied to Otis, in the present context. A sponsor would have retaining wall, were performed entirely by the plaintiff, with its own efforts and with its own funds. Otis's first to be, in some way, a person who sponsors or at least furthers the public purpose, or more accurately the public use. Here the avowed purpose was the clearing of substandard land. The purchase, razing, manicuring of the alleged substandard land, and even the erection of a huge connection with any physical manipulation of the subject parcel commenced only after the alleged public purpose (clearance of "substandard" land) had been completely accomplished. Otis sponsored no part of the accomplishment of the public purpose, but only the subsequent erection of its own industrial facilities, a peculiarly private purpose and use.

That is what distinguishes this case from *Berman v. Parker*, 348 U. S. 26. There the purpose was dual. Not only was substandard land to be cleared, but new housing was to be erected upon the cleared land. Housing has long been accepted as a public purpose, in and of itself, as have been shopping facilities necessary to the enjoyment of the housing project. There the "sponsor" who was to receive the land was to furnish housing and was in every sense a person who created something to be devoted to the public use.

Not so Otis, whose only connection with the public, and the government, was to accept a gift at their hands. By so doing it did nothing to further any public purpose or public use. It simply received an unconstitutional gift to be used for its own private purposes.

If the real purpose of the project had been slum clearance, the plaintiff would have sought to receive, for the land taken, something approximating its true value, or at least approximating plaintiff's outlay. That any other possible sponsor was rejected in advance, even of denominating the land as substandard (fourth affirmative defense), is the best proof that the plaintiff was not seeking to effectuate a public purpose advantageously to the public, but was seeking to further a private purpose at great sacrifice to the public.

It is submitted therefor that the statutes and resolutions cited, and the constitution of the state of New York as the same has been interpreted by the Court of Appeals, all violate the due process clause and the equal protection clause of the 14th amendment of the United States Constitution, and the 5th amendment thereof as the same has been incorporated into the 14th amendment.

III.

In the instant proceedings, final judgments of condemnation were awarded against the defendants without a trial or evidentiary hearing of any kind on the vital question of whether the condemnations were for a public or private purpose and use, and that such a procedure and the statutes which authorize the same violate the Fourteenth Amendment.

As was seen in the statement of facts herein no notice of motion or order to show cause was ever served upon the defendants. Quoted there is §2211 of the Civil Practice Law and Rules which provides that a litigated motion may be made only by notice of motion or order to show cause. A motion for summary judgment under R3212 of the Civil Practice Law and Rules is, of course, a litigated motion. The first time the words summary judgment were mentioned, in connection with the peculiar procedure adopted in this case, was the use of the word "summary judgment" by the Court of Appeals. Up to that point defendants were bewildered as to the sort of pretrial procedure they were faced with. This accounts for the statement by the writer of this brief in his affidavit of July 20, 1973 that "affidavits at this stage are inappropriate" (76). Now we can all be sure that it is such a motion, since the Court of Appeals has said so. It is submitted that the making and granting of a motion for summary judgment without service of the notice mandated by the statute is a denial of procedural due process in violation of the Fourteenth Amendment.

More serious, however, is the fact that Rule 3212 of the Civil Practice Law and Rules is unconstitutional since it denies, and did deny to these defendants substantive due process in violation of the same amendment. No better illustration of the vices inherent in the New York

summary judgment statute, can be given, than a recital of that which was done in the case at bar.

In Point I hereof the argument was made that it is constitutionally impermissible to appropriate or terminate a person's ownership in property without a pre-appropriation or pretermination hearing, which must be an evidentiary hearing. For that proposition this brief cited seven recent cases decided by this Court. It is submitted that to the extent that Rule 3212 of the Civil Practice Law and Rules permits the extinguishment of ownership and other interests in real property without a hearing of any kind it is unconstitutional.

It would seem necessary to discuss the opinion of this Court in *Catlin v. United States*, 324 U. S. 229. That was an appeal from judgment entered by a federal court. The Court said however that, even in the case of a state court judgment, appeal would be to the Supreme Court only after both the propriety of the condemnation and the amount of compensation have been adjudicated below. Defendants submit that *Catlin* is distinguishable.

Before the discussion of the distinction it is necessary to point out that under New York Law a judgment of taking is appealable before the matter of compensation is litigated. The best proof of that is that the Appellate Division and the Court of Appeals in the instant case entertained the appeal after the specific matter was briefed. An earlier opinion of the Appellate Division, Second Department, established that such a judgment is separately appealable.

Central Hudson Gas Corp. v. Newman, 35 A. D. 2d 989, 317 N. Y. S. 2d 887.

Catlin was decided before *Fuentes v. Shevin* and the other cases mandating pre-appropriation hearings. It did not envision the situation wherein a condemnee would be deprived entirely (in violation of the constitution) of the right to make a record on the matter of the propriety of the taking. To hold now that defendants' appeal is premature, and to send them back to litigate the matter of compensation only, at all three state court levels, would be the vainest of vain things. After the enormous delay and crushing expense occasioned by such an undertaking, defendants would be back in this Court once again, still without any record containing evidence upon which this Court could make an adjudication on the propriety of the taking. It would seem that at this state of our constitutional law the minimum necessity would be an adjudication by this Court on the question of whether the defendants were improperly denied a pre-appropriation hearing. If it were then decided that defendants are entitled to such a hearing, and the case were to be sent back therefor, this Court and all intermediate courts thereafter would have a proper record on which to decide the all important question of whether the right of eminent domain was constitutionally exercised.

(e.) There have been discussed above the various federal constitutional questions. Here there will be a discussion of the fact that they are not only substantial but crucial to the continuance of our constitutional government as we know it.

The New York Court of Appeals, in the instant case, correctly found, "The findings of the agency are not self executing. A determination of public purpose must be made by the courts themselves and they must have a basis on which to do so." Then the same court found that the agency (plaintiff) had presented no evidence tending

to show substandardness of the land. Elimination of substandardness is the only public purpose purported to be found by the Court of Appeals. Therefore by making such a finding on the basis of no proof, the Court of Appeals has made itself the very rubber stamp which it decried. It has permitted the agency to erect an impenetrable "paper shield" in the form of the agency's declaration of purpose. The epithet "paper shield" is borrowed from the opinion in *United States v. 2,606.84 Acres of Land in Tarrant County*, 309 F. S. 887. Once this paper shield is permitted to become impenetrable the courts are totally sterilized in the all important inquiry into whether there is a public purpose supporting an exercise of the power of eminent domain. The courts then become disabled by their own doing to determine what is a true purpose generating a taking as opposed to a pretext for invading private property. It becomes possible for the rich and powerful with the cooperation of their friends in government to take the property of those less rich and powerful.

Large employers would be enabled to extinguish the ownership of smaller employers. Large groups of employees, and the unions representing them, could oppress owners of property by using their financial and political potency to cause condemnation of their property. What has just been said is more than a fanciful projection. Precisely this sort of oppression of small businessmen is what was intended and is being accomplished in the instant case.

One is tempted to ask why Otis and its employees are more beloved of the constitution, than are the employers and employees who have been ousted from the subject area. The only answer is that Otis is the larger and has more employees. It would be possible, if General Motors coveted Otis's excellent location near the Hudson, for

that giant to prevail upon the City Fathers to do to Otis' (by including additional land artificially denominated as substandard) what has been done to the defendant's businesses. After all General Motors is a richer and more potent employer and it has many many more employees and jobs. Then General Motors presumably under the ruling of the New York Court of Appeals would become more dear to the constitution than Otis. This is regression to the kind of favoritism to the rich and the mighty which existed under the monarchies. This is the sort of thing our constitution was written to prevent. If the decision of the New York Court of Appeals becomes the law of the land, due process of law will have vanished, at least so far as protection of property is concerned.

The urgent need for review by this Court is underlined by the fact that three states have held unconstitutional transactions such as the instant one, and that, seemingly, New York alone has permitted this sort of manipulation (32, *supra*).

CONCLUSION.

For the foregoing reasons probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX.

Opinion of the New York State Court of Appeals.

STATE OF NEW YORK,

COURT OF APPEALS.

2

Parcel i

No. 340

IN THE MATTER

of

YONKERS COMMUNITY DEVELOPMENT AGENCY,

Respondent,

vs.

WILLIAM T. MORRIS, *et al.*,

Defendants,

Parcel ii

YONKERS COMMUNITY DEVELOPMENT AGENCY,

Respondent,

vs.

DAB-O-MATIC CORP. & GAZETTE PRESS Inc.,

Appellants,

and

WILLIAM T. MORRIS, Jr., *et al.*,

Defendants.

(and two other proceedings)

Opinion of the New York State Court of Appeals.

FUCHSBERG, J.:

We are here confronted with the question of whether a taking of land by the City of Yonkers, through its Community Development Agency, is for a sufficiently public purpose to be permissible under the requirements of our federal and state constitutions* and under applicable state and federal law.

This action arises out of the Agency's formal request for a condemnation order, pursuant to our Condemnation Law, Art. 2, §4. Defendants are tenants and landowners, both business and residential, in the area selected for redevelopment.

Both parties are before us on their pleadings and supporting papers. According to the complaint, the proposed taking of the land proceeded under the umbrella of a plan developed in accordance with state and federal urban renewal legislation for the removal of "substandard" conditions. The defendants' answers deny that the land is substandard and charge that it is to be taken, cleared and provided for a private purpose, that is, the expansion of the current plant facilities of the Otis Elevator Company, a leading industrial employer in the City of Yonkers.

The issue to be resolved is, therefore, whether defendants are entitled to a trial to determine whether the taking here serves a dominantly public purpose. There is, of course, no question but that defendants are entitled to receive payment for the full value of their properties; the question is whether they have to part with them.

The Supreme Court found that there were no issues of fact which required a trial, holding, on the basis of our decision in *Kaskel v. Impellitteri* (306 N. Y. 73), that

*U. S. Const., 5th Amndt.; N. Y. Const., Art. 1, §7.

defendants would be required to present evidence sufficient to sustain a charge of fraud in order to prevent the issuance of the condemnation order to the plaintiff Agency. The Appellate Division upheld the judgment entered on that decision. The order should be affirmed.

The purpose of the federal program, under which the plan here qualified for approval, is to aid cities in the clearance of blighted areas and in their redevelopment. Two-thirds of the difference between the cost of acquiring the land through payment to its owners of fair market value and that ultimately paid by the sponsor, here Otis, is reimbursed to the City by the federal government. The city itself pays the remaining one-third of the cost differential.

Historically, urban renewal began as an effort to remove "substandard and insanitary" conditions which threatened the health and welfare of the public, in other words "slums" (See N. Y. Const. Art. XVIII, §1), whose eradication was in itself found to constitute a public purpose for which the condemnation powers of government might constitutionally be employed. Gradually, as the complexities of urban conditions became better understood, it has become clear that the areas eligible for such renewal are not limited to "slums" as that term was formerly applied, and that, among other things, economic underdevelopment and stagnation are also threats to the public sufficient to make their removal cognizable as a public purpose. (See *Cannata v. City of New York*, 11 N. Y. 2d 210; *Murray v. La Guardia*, 291 N. Y. 320; *Kaskel v. Impellitteri*, 306 N. Y. 73; *Levin v. Township Committee of Bridgewater*, 57 N. J. 506, 274 A. 2d 1; *Schenck v. City of Pittsburgh*, 364 Pa. 31, 70 A. 2d 612; *Berman v. Parker*, 348 U. S. 26, 32; and see generally, Bosselman, Alternatives to Urban Sprawl: Legal Guidelines for Governmental Action, Research Report No. 15 to the National Commission on Urban Problems, Wash-

ington, D. C. 1968 for the historical development of these concepts of urban renewal.)

Where, then, land is found to be substandard, its taking for urban renewal is for a public purpose, just as it would be if it were taken for a public park, public school or public street. The fact that the vehicle for renewed use of the land, once it is taken, may be a private agency does not in and of itself change the permissible nature of the taking of the substandard property. Of course, if property has not been determined to be substandard in an urban renewal context, it may not be taken in eminent domain unless it is proved that its taking was for another public purpose and, if there was also a private benefit involved, that the public purpose was dominant.

Therefore, if we assume that the land here involved was substandard, as found by the Yonkers City Council and its Planning Board, it would be no defense to its condemnation that Otis openly expressed a desire to acquire it to assure its own continued economic viability in Yonkers. It would not then be necessary, as a pre-condition to the taking, to determine that the public benefit in assuring the retention of Otis as an increased source of employment opportunity in Yonkers was sufficient to outweigh the benefit that may be conferred on Otis.

Nor does it undercut the public purpose of the condemnation of the substandard land that Otis' motives are to serve its own interests. There is nothing malevolent about that. Most sponsors, where urban renewal involves industrial revival, are, as may be expected in our private enterprise economy, non-public and, at least in large part, profit-motivated. Indeed, that may even be desirable, since, unless there is such a reliable projection of profitability, the soundness and stability of the sponsor's project may come into question. For the same reasons, the fact that the Council's public hearings were held after the selection of Otis as sponsor rather than beforehand, or that the City openly and admittedly signed an agree-

ment with Otis before the condemnation of the land, under the circumstances here, and especially in the light of Otis' on-going economic importance to the community, must, at most, be regarded as mere irregularities cured by the fact that the hearings were actually held. It is also worth noting that, though presented with the opportunity for disapproval, the bi-partisan City Council was unanimous in its vote for approval.

For the same reasons and on the same assumption that the area involved was substandard, it would be no defense that Otis had indicated it would leave Yonkers if suitable land was not found for its needed modernization and expansion, or that the condemned land was adjacent to Otis' existing facilities, or that the two sites it had earlier rejected, as either uneconomical or unsuitable, were not substandard. There is nothing inherently wrong in serving both the City's need for renewal of its substandard land and its desire to keep Otis in Yonkers at one and the same time. Nor is it remarkable that Otis would get the condemned land for a price which is but a fraction of that paid to the defendants and the other owners in condemnation. The very purpose of urban renewal subsidies is to attract new or existing sponsors to undertake the land clearing, the construction and other commitments the community desires of them, where the cost of acquiring the land privately, on a piece by piece basis, would be sufficiently expensive or difficult to deter private entities. (See *64th St. Residences, Inc., v. City of New York*, 4 N. Y. 2d 268.)

We turn now to the subordinated issue in this case: Was the land to be condemned shown to be substandard?

As already indicated, on that question the Agency's road is made easier by the liberal rather than literal definition of a "blighted" area now universally endorsed by case law. Many factors and interrelationships of factors may be significant. These may include such diverse matters as irregularity of the plots, inadequacy of the streets,

diversity of land ownership making assemblage of property difficult, incompatibility of the existing mixture of residential and industrial property, overcrowding, the incidence of crime, lack of sanitation, the drain an area makes on municipal services, fire hazards, traffic congestion, and pollution. It can encompass areas in the process of deterioration or threatened with it as well as ones already rendered useless, prevention being an important purpose. It is "something more than deteriorated structures. It involves improper land use. Therefore its causes, originating many years ago, include not only outmoded and deteriorated structures, but unwise planning and zoning, poor regulatory code provisions and inadequate provisions for flow of traffic." (Cook, *The Battle Against Blight*, 43 *Marquette L. Rev.* 444). For, the public safety, public health and public welfare, all legitimate objects of the police power, are broad and inclusive. (*Berman v. Parker*, 348 U. S. 26). And it may even include vacant land (*Cannatta v. City of New York*, *supra*) and air rights (*The Jersey City Chapter of Property Owner's Protective Assn. v. City Council*, 55 N. J. 86, 259 A. 2d 698).

Nor is it necessary that the degree of deterioration or precise percentage of obsolescence or mathematical measurement of other factors be arrived at with precision, since the combination and effects of such things are highly variable. (*Chicago v. R. Zwick Co.*, 27 Ill. 2d 128, 188 N. E. 2d 489.) These matters call for the exercise of a considerable degree of practical judgment, common sense and sound discretion.

Moreover, extensive authority to make the initial determination that an area qualifies for renewal as "blighted" has been vested in the agencies and the municipalities; courts may review their findings only upon a limited basis. (See *Kaskel v. Impelliteri*, *supra*; *Murray v. La Guardia*, *supra*; *Denihan Enterprises, Inc. v. O'Dwyer*, 302 N. Y. 451; *Cannata v. City of New York*,

supra; Anno. What Constitutes "Blighted Area" Within Urban Renewal and Redevelopment Statutes, 45 A. L. R. 3d 1096-1137 and cases cited therein, Marquis, Constitutional and Statutory Authority to Condemn, 43 Iowa L. Rev. 170; *Babcock v. Community Redevelopment Agency*, 148 Cal. App. 2d 38, 306 P. 2d 513; *Worcester Knitting Realty Co. v. Worcester Housing Authority*, 335 Mass. 19, 138 N. E. 2d 356; *Oliver v. City of Clairton*, 374 Pa. 333, 98 A. 2d 47; *Bleecker Luncheonette, Inc. v. Wagner*, 141 N. Y. S. 2d 293, aff'd 286 App. Div. 828.)

However, even where the law expressly defines the removal or prevention of "blight" as a public purpose and leaves to the agencies wide discretion in deciding what constitutes blight, facts supporting such a determination should be spelled out. It may be that plaintiff here would have no difficulty in doing so in its papers or by way of proof. It did not do so.

Here, other than the Agency's bare pleading of its "substandard" finding, it provided no further data as to the condition of the area, except for the general statement that at least fifty percent of the structures in the area are "substandard", a figure which, as defendants point out, did no more than coincide with the figure found in an earlier comprehensive City plan, which had designated the area here involved as suitable for rehabilitation rather than clearance. No more can be found in the rest of the Agency's supporting papers. They supply only information about the improvements which will be made by Otis *after* it receives the land and the conditions placed upon Otis' *subsequent* use of the land. The Agency has not indicated in any manner the grounds upon which it concluded that the land is presently substandard. Indeed, in its reply to defendants' claims, the Agency states that its findings in this regard are conclusive and establish a public purpose as a matter of law.

Extensive review of the case law both in New York and in our sister states regarding the proper scope of review

which courts may apply to such agency findings reveals that, even where courts stated most strongly that their role in reviewing agency findings was a circumscribed one, more was required to be submitted to the courts than the Agency has supplied here. (See Anno., Urban Redevelopment Laws, 44 ALR 2d 1414-1449, ALR 2d Later Case Service 473-484 and cases cited therein; Anno., What Constitutes "Blighted Area" Within Urban Renewal and Redevelopment Statutes, 45 ALR 3d 1096-1137 and cases cited therein; Bosselman, *supra*; Note Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration, 72 Harv. L. Rev. 504.)

Carefully analyzed, it is clear that in such situations, courts are required to be more than rubber stamps in the determination of the existence of substandard conditions in urban renewal condemnation cases. The findings of the agency are not self-executing. A determination of public purpose must be made by the courts themselves and they must have a basis on which to do so. (*Denihan Enterprises, Inc. v. O'Dwyer, supra*.)

The rationale of *Kaskel v. Impelliteri, supra*, is not to the contrary. In *Kaskel*, while upholding a taking of land in Manhattan against an allegation by taxpayers that the taking was really for the purpose of obtaining federal funds to support the erection of a new coliseum, the majority, after affirming some of the general propositions we have noted above, held that such taxpayers, suing under §51 of the General Municipal Law, were required to make out either actual fraud or illegality in the sense of a public expenditure totally beyond the power of an agency, because those are the only grounds on which otherwise uninjured taxpayers are permitted standing under §51. Interestingly, the entire Court concurred in the initial premise of Judge Van Voorhis (who dissented on the facts) that, in order to utilize the public purpose attached to clearance of substandard land, such

clearance must be the primary purpose of the taking, not some other public purpose, however laudable it might be.

The majority also noted that the plaintiff taxpayers did not dispute the factual findings of the agency, proof to support which had been presented to the Court in some detail, even to the inclusion of photographs of the area condemned. Plaintiffs there disputed only the agency's conclusion that clearance of a large area of land was justified by those facts. Pointing out that the pictures and data before them clearly showed slum conditions, the Court said:

"There is no dispute as to the physical facts. . . . Power to make that determination has been lodged by the Constitution . . . and the statute . . . in the city planning commission and the board of estimate, and, when those bodies have made their findings, not corruptly, or irrationally, or baselessly, there is nothing for the courts to do about it. . . . (*Id.* at 78.)

Under *Kaskel*, then, summary judgment should be awarded to an Urban Renewal agency if, in the first instance, it presents to the court an adequate basis upon which it concluded that the land was substandard, and if the landowners then cannot show that the agency's determination is without foundation.

Despite the principles discussed, the landowners have failed to raise properly by their pleadings the issue of the quality of the taken land. Although they did refer to the land as not substandard, they deliberately subordinated, suppressed, and obscured that issue. Indeed, the arguments by the owners with respect to the quality of the land were offered as a makeweight only to their principal but irrelevant argument that turning over of the razed properties to Otis was not pursuant to a proper

public purpose in ridding the community of substandard land. Repeatedly in their pleadings and their briefing defendant owners stressed that the issue is not the quality of the land (on which issue, they mistakenly said, they must lose because of the "omnipotence" given to urban renewal agencies), but, instead, is the alleged evil purpose in benefiting a large manufacturer which the city wishes to retain in the community.

As a consequence of this approach, the courts below were never confronted with the proper issue in the case and as a further consequence, the owners must have failed in their contentions taken in gross. In the meantime, the taking has occurred without hindrance, the buildings have been demolished, and at this late date, owners seek not, in effect, the retention of their properties but the wreaking of some kind of vengeance on the city. In this status of the case, the subordination of a valid issue under an untenable contention, defendant owners are no longer entitled to relief and there should be an affirmation.

Accordingly, the order of the Appellate Division should be affirmed.

• • •

Order affirmed, without costs. Opinion by Fuchsberg, J. All concur.

**Opinion and Dissenting Opinion of Appellate Division
of the Supreme Court, Second Department.**

45 A. D. 2d 889, 357 N Y S 2d 887.

mc

A—April 30, 1974.

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YONKERS COMMUNITY DEVELOPMENT AGENCY,

Plaintiff,

v.

WILLIAM T. MORRIS, Jr., *et al.*,

Defendants.

(Parcel I.)

YONKERS COMMUNITY DEVELOPMENT AGENCY,

Respondent,

v.

WILLIAM T. MORRIS, Jr., *et al.*,

Defendants,

and

DAB-O-MATIC CORP., *et al.*,

Appellants.

 (Parcel II.)

YONKERS COMMUNITY DEVELOPMENT AGENCY,

*Plaintiff,**v.*WILLIAM T. MORRIS, Jr., *et al.*,*Defendants.*

 (Parcel III.)

YONKERS COMMUNITY DEVELOPMENT AGENCY,

*Respondent,**v.*

LESTER WEINBERG,

Appellant.

 YONKERS COMMUNITY DEVELOPMENT AGENCY,
*Respondent,**v.*THOMAS BARCA, *et al.*,*Appellants,**et al.*,*Defendants.*

 Consolidated appeals from three judgments of the Supreme Court, Westchester County, one in the first above-

mentioned proceeding dated October 24, 1973, and one in each of the other two proceedings dated October 23, 1973, *inter alia* condemning certain real property.

Judgments affirmed, without costs.

By these proceedings, plaintiff sought to condemn three separate parcels of real property in Yonkers, New York, for the purpose of urban renewal. The appealing defendants have interposed answers, claiming that the taking is unconstitutional as to them, and demanding a hearing concerning their allegations of illegality. In general, appellants claim that the purpose of the taking was designed to placate Otis Elevator Company, a large taxpayer and employer in Yonkers, against removing its manufacturing plant, by selling to Otis, for expansion of its facilities, the land which is the subject of the condemnation proceedings. Special Term held that no hearing was required and granted condemnation to plaintiff.

It is, of course, the rule that whether a condemnation is for a public purpose is a judicial question, the resolution depending to a large extent on the legislative findings (*Matter of New York City Housing Auth. v. Muller*, 270 N. Y. 333; *Matter of Murray v. LaGuardia*, 291 N. Y. 320). The taking of substandard real estate by a municipality for redevelopment by private corporations is a public use (*Cannata v. City of New York*, 11 N. Y. 2d 210, 215). Here the legislative findings establish that the area in question is appropriate for urban renewal, in that substandard property would be eliminated, a marketable industrial site created, and other city development integrated with the proposed urban renewal. These findings reflect as well the recognized need for expansion of Otis.

Appellants in their brief urge that, though they do not question the need of the parcels for the purposes of plaintiff, or that particular parcels are substandard, the dominant purpose of the taking is private and not public. But it is settled that an area may be rehabilitated accord-

ing to a design and for any purpose which renders the area no longer substandard (*Kaskel v. Impellitteri*, 306 N. Y. 73). No justiciable issue is raised on this record with respect to the claim of benefit to Otis only, as the legislative findings demonstrate at least a benefit as well to the city as a whole by the elimination of a substandard area, and the development of an industrial site. A hearing was thus unnecessary.

Hopkins, Acting P. J., Martuscello, Cohalan and Brennan, JJ., concur.

Munder, J., dissents and votes to reverse the judgments and to remit the proceedings to Special Term for a hearing, with the following memorandum:

Special Term concluded that there was no basis for the application by some of the defendants for a hearing on the legality and constitutionality of the taking. I cannot agree and therefore cannot vote with the majority in affirming the judgments.

As stated in their brief, appellants do not raise the issue of whether the property in question is necessary to plaintiff's purpose, or whether the property is a slum or substandard. They simply urge that "the dominant purpose of the entire taking is private and not public". In my opinion, appellants have established their right to be heard on the issue of public use (see *Fifth Ave. Coach Lines v. City of New York*, 11 N. Y. 2d 342, 348).

The record shows that the Otis Elevator Company, one of the largest single employers in Yonkers, has been threatening to leave the city for many years because of lack of space to expand and modernize its facilities. This, understandably, caused tremendous concern to the city father as well as local, state and federal government officials representing the area. No stone was left unturned in the effort to coax Otis to remain in Yonkers. No less

than three different sites were offered to Otis for expansion, etc., but all three were turned down. Finally, the property in question in this case, which adjoins the property presently occupied by Otis, was selected and apparently found to be "suitable". The machinery then was set in motion to acquire the property (which consists of approximately 9.2 acres), clear the land, grade it and then sell it to Otis, and all this under the guise of urban renewal.

True, appellants do not say that there was any fraud or deceit on the part of the officials and agencies involved. I, however, agree with their contention that there is sufficient question raised about "public use" to require a hearing. The fact that a project is desirable or that it may have some indirect public benefit does not mean that it is essentially for a public purpose (see *Matter of New York City Housing Auth. v. Muller*, 270 N. Y. 333, 343). The courts must be diligent in protecting the private rights of property owners against unlawful incursions by government in the name of progress. The question of whether or not a taking is for a public use is a *judicial* one. That question has not been judicially determined in this case (see *Denihan Enterprises, Inc., v. O'Dwyer*, 302 N. Y. 451, 457-458).

**Opinion of the Special Term of the Supreme Court,
Westchester County in the Matter of Barca (Parcel
III).**

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF WESTCHESTER.

[SAME TITLE.]

McCULLOUGH, J.:

These are motions concerning property involved in condemnation proceedings in the City of Yonkers. There are identical motions involving three separate parcels designated as the Barca Property, the Weinberg property and the Morris Property. In each case the plaintiff is the Yonkers Urban Renewal Agency, and in each case the defendants are all represented by the same firm of attorneys. The issues involved are identical in each case and so the same decision will apply to all three proceedings.

For the last several years, the plaintiff, Yonkers Urban Renewal Agency (Agency), has been involved in plans for the renewal of various portions of the City of Yonkers, principally in the downtown area. In this vicinity there is, and has been for many years, located a factory complex belonging to the Otis Elevator Company (Otis). It is the intention of the plaintiff to acquire some 9.2 acres of land adjacent to Otis, clear the land, grade it and then sell it to Otis for expansion of its facilities. As part of that plan, the plaintiff has commenced condemnation proceedings against various property owners and tenants including the defendants herein. In each case, in answer to the petition for orders of condemnation, the defendants have interposed answers and have set forth affirmative defenses alleging,

in substance, that the taking is improper and unconstitutional and requesting a hearing as to the legality of the taking. In the case involving the Morris property, the owners have appeared by an attorney and conceded that the taking is proper and that the only issue is that of just compensation. In the Morris case, the opposition to the taking is by tenants.

After these issues had been submitted to the Court, the defendants in each case brought identical motions for an order pursuant to Section 408 of the CPLR to take extensive depositions of the plaintiff concerning the factual background of the proposed taking. These motions are also before the Court for determination.

While the papers submitted on these proceedings are voluminous, the actual issue involved is comparatively simple. Basically, the defendants argue that for many years Otis has adopted a course of conduct which consists of more or less constantly threatening to move its operations to other locations out of the City and State with a consequent loss of hundreds of jobs for Yonkers residents. It is claimed that during the 1950s, Otis threatened to move its operation unless it gained title to certain public streets and was successful in obtaining such title. In 1965, it is alleged that, unless the City of Yonkers would consent to help it expand its facilities, it would move its operation to the State of Indiana. Thereafter, in 1969, Otis talked of moving to the State of New Jersey. In substance, it is claimed that each time Otis would make such a "threat", city officials of the City of Yonkers would outdo themselves in agreeing to any concessions that Otis demanded.

There is another side to the factual coin. It is undisputed that Otis is one of the largest, if not the largest, single employer in the City of Yonkers. As with any other large manufacturing organizations, its requirements as to space and equipment have changed over the years.

Machinery and buildings deteriorate and have to be replaced. New techniques are developed that require additional space and equipment. It is contended by the plaintiff that, prior to June of 1972, officials of the City of Yonkers and Otis discussed a need by Otis to expand its facilities which would result in a substantial increase in the number of jobs at this facility. As an alternative, if Otis were unable to expand in the City, it would have to move its entire facility to an area where land was available. As a result, the plaintiff was consulted and the proposal which is the subject of this litigation was worked out. Thereafter, public hearings were held before the planning board and the City Council and the pros and cons of the plan were discussed in detail. Newspaper articles and editorials appeared in the news media concerning the proposal.

This Court is of the opinion that the plaintiff is entitled to an order of condemnation and that there is no basis for the defendants' application for a hearing on the legality and constitutionality of the taking. It is clear that the plaintiff, the City Council and the Planning Board, have acted with complete candor and that the aim of the program is a redevelopment of the effected area which would result in room for expansion for Otis and a consequent economic benefit to the community. This type of planning has consistently been held to be constitutional. In the case of *Connata v. City of New York*, 11 N. Y. 2d 210, the Court of Appeals said at page 215:

"We see nothing unconstitutional on the face of this statute or in its proposed application to these undisputed facts. Taking of substandard real estate by a municipality for redevelopment by private corporations has long been recognized as a species of public use (*Matter of Murray v. LaGuardia*, 291 N. Y. 320; see *Kaskel v. Impellitteri*, 306 N. Y. 73, cert. den. 347 U. S. 934; *Cuglar*

v. Power Auth. of State of N. Y., 3 N. Y. 2d 1006). The condemnation by the city of an area such as this so that it may be turned into sites for needed industries is a public use (see *Graham v. Houlihan*, 147 Conn. 321; *Opinion of the Justices*, 334 Mass. 760; *Wilson v. Long Branch*, 27 N. J. 360; *People ex rel. Adamowski v. Chicago Land Clearance Comm.*, 14 Ill. 2d 74; *Berman v. Parker*, 348 U. S. 26)."

Furthermore, while the affirmative defenses make some technical objection to the procedures followed, basically, it is clear, that the defendants here are attacking the motives and thought processes of the City Council, the Planning Board and the Agency. There is, however, no allegation or claim that the acts complained of are corrupt or fraudulent. Again, the Court of Appeals in the case of *Kaskel v. Impellitteri*, 306 N. Y. 73, at pages 78-79, said:

"The opinion of Judge VanVoorhis disposes of all plaintiff's contentions, except that stated in clause (D) of paragraph Twenty-Four of the complaint, 'That the project area is not a substandard and insanitary area, and that any finding, consent or report by the defendants to the effect that such area is a substandard and insanitary area is unreasonable, arbitrary, capricious and illegal'. That part of the complaint apparently attempts to state a taxpayer's action under section 51 of the General Municipal Law. However, since no corruption or fraud is charged, plaintiff Kaskel, as a taxpayer, cannot succeed in such a suit, unless there is a total lack of power in defendants, under the law, to do the acts complained of, *Kittinger v. Buffalo Traction Co.*, 160 N. Y. 377, 54 N. E. 1081; *Altschul v. Ludwig*, 216 N. Y. 459, 111 N. E. 216. The decisions under section 51 make it entirely clear that redress may be had only when the acts complained of are fraudulent, or a waste

of public property in the sense that they represent a use of public property or funds for entirely illegal purposes. Although the plaintiff here complains of the choice of this site for clearing and redevelopment as being 'arbitrary and capricious', we must keep in mind that this is not an 'article 78' proceeding dealing with a situation wherein it might be claimed that public officials, although acting within their powers, are doing so in a way that is arbitrary or capricious. The substance of plaintiff's contention in this respect is simply that this whole project is illegal because, according to him the chosen site or area is not in fact substandard or insanitary."

See also *Amsterdam Urban Renewal v. Bohlke*, 40 A. D. 2d 736; *County of Orange v. Public Service Commission*, 39 A. D. 2d 311, aff'd no opinion 31 N. Y. 2d 843.

The affirmative defenses interposed by the defendants are dismissed and in view of this holding, the defendant's motions for dispositions pursuant to section 408 of the CPLR are rendered academic and those motions are denied.

Submit order and judgment providing for the appointment of Commissioners of Appraisal on notice at Room 415, Westchester County Court House, White Plains, New York.

Dated: October 9, 1973

White Plains, New York

s/ FRANK S. McCULLOUGH
J. S. C.

Wekstein, Friedman & Fulfree, Esqs.
Attorneys for Defendants

Bernardo & Farrauto, Esqs.
Attorneys for Plaintiff

**Opinion of the Supreme Court, Westchester County
in the Matter of Weinberg (Parcel III).**

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF WESTCHESTER.

[SAME TITLE.]

McCULLOUGH, J.:

These are motions concerning property involved in condemnation proceedings in the City of Yonkers. There are identical motions involving three separate parcels designated as the Barca Property, the Weinberg property and the Morris Property. In each case the plaintiff is the Yonkers Urban Renewal Agency, and in each case the defendants are all represented by the same firm of attorneys. The issues involved are identical in each case and so the same decision will apply to all three proceedings.

For the last several years, the plaintiff, Yonkers Urban Renewal Agency (Agency), has been involved in plans for the renewal of various portions of the City of Yonkers, principally in the downtown area. In this vicinity there is, and has been for many years, located a factory complex belonging to the Otis Elevator Company (Otis). It is the intention of the plaintiff to acquire some 9.2 acres of land adjacent to Otis, clear the land, grade it and then sell it to Otis for expansion of its facilities. As part of this plan, the plaintiff has commenced condemnation proceedings against various property owners and tenants, including the defendants herein. In each case, in answer to the petition for orders of condemnation, the defendants have interposed answers and have set forth affirmative defenses alleging, in substance, that the taking is improper and unconstitutional and

(The remainder of the decision is the same as that rendered in the Thomas Barca proceeding.)

**Opinion of the Supreme Court, Westchester County
in the Matter of Dab-O-Matic Corp. and Gazette Press,
Inc. (Parcel II).**

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF WESTCHESTER.

[SAME TITLE.]

McCULLOUGH, J.:

These are motions concerning property involved in condemnation proceedings in the City of Yonkers. There are identical motions involving three separate parcels designated as the Barca Property, the Weinberg property and the Morris Property. In each case the plaintiff is the Yonkers Urban Renewal Agency, and in each case the defendants are all represented by the same firm of attorneys. The issues involved are identical in each case and so the same decision will apply to all three proceedings.

For the last several years, the plaintiff, Yonkers Urban Renewal Agency (Agency), has been involved in plans for the renewal of various portions of the City of Yonkers, principally in the downtown area. In this vicinity there is, and has been for many years, located a factory complex belonging to the Otis Elevator Company (Otis). It is the intention of the plaintiff to acquire some 9.2 acres of land adjacent to Otis, clear the land, grade it and then sell it to Otis for expansion of its facilities. As part of that plan, the plaintiff has commenced condemnation proceedings, against various property owners and tenants including the defendants herein. In each case, in answer to the petition for orders of condemnation, the defendants have interposed answers and have set forth affirmative defenses alleging, in substance, that the taking is improper and unconstitutional and

(The remainder of the decision is the same as that rendered in the Thomas Barca proceeding.)

§555 General Municipal Law, subdivision 2.

2. Notwithstanding the provisions of any general, special or local law or charter provision applicable to the acquisition of real property by condemnation, in any condemnation proceeding brought by an agency or a municipality for and on behalf of an agency to acquire property in an urban renewal area the agency or the municipality may file, at any time before judgment a declaration by the petitioner that the property described in the petition is being taken in connection with the carrying out of an urban renewal program. Such declaration shall include or have annexed a statement of the authorization for the taking, a description of the property sufficient to identify same, and a statement of the sum of money estimated to be just compensation for the property being taken. Upon filing such declaration and the deposit, in the court in which the proceeding is pending, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in such declaration, title in fee simple to such property shall vest in the petitioner and the right to just compensation shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of six per centum per annum to the date of payment on the amount finally awarded as the value of the property; but interest shall not be allowed on so much thereof as shall have been paid into court. No sum so paid into court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding.

If the compensation finally awarded in respect of said property, or any parcel thereof, shall exceed the amount of money so received by any person entitled thereto, the court shall enter judgment against the agency or municipality for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have the power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession. The court shall have the power to make such orders in respect to encumbrances, liens, rents, taxes, assessments, insurance and other charges, if any, as shall be just and equitable.

Article 18, Section 1, New York State Constitution.

§1. [Housing for persons of low income and nursing home accommodations; slum clearance]

Subject to the provisions of this article, the legislature may provide in such manner, by such means and upon such terms and conditions as it may prescribe for low rent housing and nursing home accommodations for persons of low income as defined by law, or for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas, or for both such purposes, and for recreational and other facilities incidental or appurtenant thereto.

Added L. 1962, c. 921, §1; amended L. 1965, c. 947, §2; L. 1966, c. 606, §1; L. 1966, c. 912, §2; L. 1967, c. 748, §7; L. 1968, c. 307, §2; L. 1968, c. , §1; L. 1969, c. 1002, §§ 1, 2; L. 1970, c. 247, §1; L. 1972, c. 357, §§ 2, 3.

Article 18, Section 2, New York State Constitution.

§2. [*Idem*; powers of legislature in aid of]

For and in aid of such purposes, notwithstanding any provision in any other article of this constitution, but subject to the limitations contained in this article, the legislature may: make or contract to make or authorize to be made or contracted capital or periodic subsidies by the state to any city, town, village, or public corporation, payable only with moneys appropriated therefor from the general fund of the state; authorize any city, town or village to make or contract to make such subsidies to any public corporation, payable only with moneys locally appropriated therefor from the general or other fund available for current expenses of such municipality; authorize the contracting of indebtedness for the purpose of providing moneys out of which it may make or contract to make or authorize to be made or contracted loans by the state to any city, town, village or public corporation; authorize any city, town or village to make or contract to make loans to any public corporation; authorize any city, town or village to guarantee the principal of interest on, or only the interest on, indebtedness contracted by a public corporation; authorize and provide for loans by the state and authorize loans by any city, town or village to or in aid of corporations regulated by law as to rents, profits, dividends and disposition of their property or franchises and engaged in providing housing facilities or nursing home accommodations; authorize any city, town or village to make loans to the owners of existing multiple dwellings for the rehabilitation and improvement thereof for occupancy by persons of low income as defined by law; grant or authorize tax exemptions in whole or in part, except that no such exemption may be granted or authorized for a period of more than sixty years; authorize cooperation with and the acceptance of

aid from the United States; grant the power of eminent domain to any city, town or village, to any public corporation and to any corporation regulated by law as to rents, profits, dividends and disposition of its property or franchises and engaged in providing housing facilities.

As used in this article, the term "public corporation" shall mean any corporate governmental agency (except a county or municipal corporation) organized pursuant to law to accomplish any or all of the purposes specified in this article.

Rule 3212, New York Civil Practice Law and Rules.

R 3212. Motion for summary judgment.

(a) Time; kind of action. Except as provided in subdivision (d) with respect to a matrimonial action, any party may move for summary judgment in any action, after issue has been joined.

(b) Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the

motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.

(c) Immediate trial. If it appears that the only triable issues of fact arising on a motion for summary judgment relate to the amount or extent of damages, or if the motion is based on any of the grounds enumerated in subdivision (a) or (b) of rule 3211, the court may, when appropriate for the expeditious disposition of the controversy, order an immediate trial of such issues of fact raised by the motion, before a referee, before the court, or before the court and a jury, whichever may be proper.

(d) Matrimonial actions. In a matrimonial action, a motion for summary judgment may be made only on the basis of documentary evidence or official records which establish a defense to the cause of action. The motion shall be granted if upon such evidence or records, the defense shall be established sufficiently to warrant the court as a matter of law in directing judgment.

(e) Partial summary judgment; severance. Except as provided in subdivision (d) with respect to a matrimonial action, in any action summary judgment may be granted as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just. The court may also direct:

1. that the cause of action as to which summary judgment is granted shall be severed from any remaining cause of action; or

2. that the entry of the summary judgment shall be held in abeyance pending the determination of any remaining cause of action.

(f) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

(g) Limitation of issues of fact for trial. If a motion for summary judgment is denied or is granted in part, the court, by examining the papers before it and, in the discretion of the court, by interrogating counsel, shall, if practicable, ascertain what facts are not in dispute or are incontrovertible. It shall thereupon make an order specifying such facts and they shall be deemed established for all purposes in the action. The court may make any order as may aid in the disposition of the action.

§4 of the Condemnation Law of the State of New York.

§4. Petition to supreme or county court; what to contain

The proceeding shall be instituted by the presentation of a petition by the plaintiff to the county court of the county in which the property is situated or to a special term of the supreme court, held in the judicial district in which the property is located setting forth the following facts:

1. His name, place of residence, and the business in which engaged; if a corporation, co-operative corporation or joint-stock association, whether foreign or domestic, its principal place of business within the state, the names and places of residence of its principal officers, and of its directors, trustees or board of managers, as the case may be, and the object or purpose of its incorporation or association; if a political division of the state, the names and places of residence of its principal officers; and if the state, or any commission or board of managers or trustees in charge or having control of any of the charitable or other institutions of the state, the name, place of residence of the officer acting in its or their behalf in the proceedings.

2. A specific description of the property to be condemned, and its location, by metes and bounds, with reasonable certainty.

3. The public use for which the property is required and either:

a. a concise statement of the facts showing the necessity of its acquisition for such use, or,

b. if the property is to be used for the construction of a major utility transmission facility as defined in section one hundred twenty or major steam electric generating facility as defined in section one hundred forty of the public service law with respect to which a certificate of environmental compatibility and public need has been issued under such law, a statement that such certificate relating to such property has been issued and is in force.

3. The public use for which the property is required and a concise statement of the facts showing the necessity of its acquisition for such use.

4. The names and places of residence of the owners of the property; if an infant, the name and place of residence of his general guardian, if he has one; if not, the name and place of residence of the person with whom he resides; if a lunatic, idiot, or habitual drunkard, the name and place of residence of his committee or trustee, if he has one; if not, the name and place of residence of the person with whom he resides. If a non-resident, having an agent or attorney residing in the state authorized to contract for the sale of the property, the name and place of residence of such agent or attorney; if the name or place of residence of any owner cannot after diligent inquiry be ascertained, it may be so stated with a specific statement of the extent of the inquiry which has been made.

5. That the plaintiff has been unable to agree with the owner of the property for its purchase, and the reason of such inability.

6. The value of the property to be condemned.

7. A statement that it is the intention of the plaintiff, in good faith, to complete the work or improvement, for which the property is to be condemned; and that all the preliminary steps required by law have been taken to entitle him to institute the proceedings.

8. A demand for relief, that it may be adjudged that the public use requires the condemnation of the real property described, and that the plaintiff is entitled to take and hold such property for the public use specified,

upon making compensation therefor, and that commissioners of appraisal be appointed to ascertain the compensation to be made to the owners for the property so taken.

§11 Condemnation Law of the State of New York.

§11. Trial of issues

The court shall try any issue raised by the petition and answer at such time and place as it may direct, or it may order the same to be referred to a referee to hear and determine, and upon such trial the court or referee shall file a decision in writing, or deliver the same to the attorney for the prevailing party, within twenty days after the final submission of the proofs and allegations of the parties, and the provisions of the civil practice act relating to the form and contents of decisions upon the trial of issues of fact by the court or a referee,¹ and to making and filing exceptions thereto,² and the making and settlement of a case for the review thereof upon appeal,³ and to the proceedings which may be had in case such decision is not filed or delivered within the time herein required,⁴ and to the powers of the court and referee upon such trial,⁵ shall be applicable to a trial and decision under this chapter.

Article 8, §1 of the New York State Constitution.

- §1. [Gift or loan of property or credit of local subdivisions prohibited; exceptions for enumerated purposes]

No county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking, or become directly or indirectly the owner of stock in, or bonds of, any private corporation or association; nor shall any county, city, town, village or school district give or loan its credit to or in aid of any individual, or public or private corporation or association, or private undertaking, except that two or more such units may join together pursuant to law in providing any municipal facility, service, activity or undertaking which each of such units has the power to provide separately. Each such unit may be authorized by the legislature to contract joint or several indebtedness, pledge its or their faith and credit for the payment of such indebtedness for such joint undertaking and levy real estate or other authorized taxes or impose charges therefor subject to the provisions of this constitution otherwise restricting the power of such units to contract indebtedness or to levy taxes on real estate. The legislature shall have power to provide by law for the manner and the proportion in which indebtedness arising out of such joint undertakings shall be incurred by such units and shall have power to provide a method by which such indebtedness shall be determined, allocated and apportioned among such units and such indebtedness treated for purposes of exclusion from applicable constitutional limitations, provided that in no event shall more than the total amount of indebtedness incurred for such joint undertaking be included in ascertaining the power of all

such participating units to incur indebtedness. Such law may provide that such determination, allocation and apportionment shall be conclusive if made or approved by the comptroller. This provision shall not prevent a county from contracting indebtedness for the purpose of advancing to a town or school district, pursuant to law, the amount of unpaid taxes returned to it.

Subject to the limitations on indebtedness and taxation applying to any county, city, town or village nothing in this constitution contained shall prevent a county, city or town from making such provision for the aid, care and support of the needy as may be authorized by law, nor prevent any such county, city or town from providing for the care, support, maintenance and secular education of inmates of orphan asylums, homes for dependent children or correctional institutions and of children placed in family homes by authorized agencies, whether under public or private control, or from providing health and welfare services for all children, nor shall anything in this constitution contained prevent a county, city, town or village from increasing the pension benefits payable to retired members of a police department or fire department or to widows, dependent children or dependent parents of members or retired members of a police department or fire department; or prevent the city of New York from increasing the pension benefits payable to widows, dependent children or dependent parents of members or retired members of the relief and pension fund of the department of street cleaning of the city of New York. Payments by counties, cities or towns to charitable, eleemosynary, correctional and reformatory institutions and agencies, wholly or partly under private control, for care, support and maintenance, may be authorized, but shall not be required, by the legislature. No such payments shall be made for any person cared for by any such in-

stitution or agency, nor for a child placed in a family home, who is not received and retained therein pursuant to rules established by the state board of social welfare or other state department having the power of inspection thereof.

Resolution No. 265-1972 of the Yonkers City Council.

RESOLUTION NO. 265-1972

BY ENTIRE COUNCIL:

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF YONKERS FINDING AN AREA APPROPRIATE FOR URBAN RENEWAL AND DESIGNATING SAID AREA AN URBAN RENEWAL AREA (OTIS AREA).

WHEREAS, the Yonkers Urban Renewal Agency (herein called the "Local Public Agency") has, by Resolution No. 24-1972 adopted June 9, 1972, found an area in the City of Yonkers more fully described in Exhibit A attached hereto appropriate for urban renewal as defined in Section 502 (3) of Article 15 of the General Municipal Law of the State of New York, as amended, and has recommended to the City Council of the City of Yonkers (herein called the "Governing Body") that it designate said area an urban renewal area pursuant to Section 504 of such Law; and

WHEREAS, the Local Public Agency has submitted to the Governing Body documentation prepared by the Local Public Agency and its consultants demonstrating that the area more fully described in Exhibit A attached

hereto is a substandard and insanitary area and that it is detrimental and a menace to the safety, health and welfare of the inhabitants and users thereof and of the City of Yonkers at large, and is therefore appropriate for urban renewal as defined in Section 502 (3) of Article 15 of the General Municipal Law of the State of New York, as amended; now, therefore,

BE IT RESOLVED by the City Council of the City of Yonkers:

1. That the area more fully described in Exhibit A attached hereto is hereby found appropriate for urban renewal as defined in Section 502 (3) of Article 15 of the General Municipal Law of the State of New York, as amended.

2. That the area more fully described in Exhibit A attached hereto is hereby designated an urban renewal area pursuant to Section 504 of Article 15 of the General Municipal Law of the State of New York, as amended.

ADOPTED by the City Council at a stated meeting held June 27th, 1972; by a vote of 12-0; Councilman Hanney absent.

FRANCES P. BAGAIN: City Clerk

Exhibit A

Beginning at a point which is the northwest corner of lot 32, block 2011; thence easterly along the south right-of-way line of Ashburton Avenue to its intersection with the west right-of-way line of Warburton Avenue; thence southerly along the west right-of-way line of Warburton Avenue to the southeast corner of lot 5, block 2016; thence

westerly along the southern boundary of lot 5, block 2016, to its intersection with the east right-of-way line of Woodworth Avenue; thence southerly along the east right-of-way line of Woodworth Avenue to its intersection with the easterly extension of the southern boundary of lot 1, block 2008; thence westerly along the easterly

extension of the southern boundary of lot 1 in block 2008, across Woodworth Avenue to its intersection with the west right-of-way line of Woodworth Avenue; thence northerly along the west right-of-way line of Woodworth Avenue to the southeast corner of lot 30, block 2011; thence westerly along the southern boundary of lot 30, block 2011, to the southwest corner of lot 30, block 2011; thence northerly along a line formed by the western boundary lines of lots 30 and 32, block 2011, to the northwest corner of lot 32, block 2011, which is the point and place of beginning.

Resolution No. 55-1972 of the Yonkers Urban Renewal Agency.

RESOLUTION OF THE YONKERS URBAN RENEWAL AGENCY APPROVING URBAN RENEWAL PLAN AND CONDITIONS UNDER WHICH RELOCATION PAYMENTS WILL BE MADE FOR N.D.P. AREA NO 4 IN NEIGHBORHOOD DEVELOPMENT PROGRAM NO. N. Y. A-4.

Motion by: Alfred B. Del Bello Seconded by: James J. Hauser, Jr.

WHEREAS, in connection with an application of the Yonkers Urban Renewal Agency (herein called the "Local

Public Agency") to the Secretary of Housing and Urban Development for financial assistance under Title I of the Housing Act of 1949, as amended, to carry out the Yonkers Neighborhood Development Program, N. Y. A-4 (herein called the "Program") for an additional urban renewal area (said urban renewal area being more fully described in Exhibit A attached hereto and made a part hereof and herein called "N.D.P. Area No. 4"), the approval by the Local Public Agency of the Urban Renewal Plan for N.D.P. Area No. 4 involved in such application is required by the Federal Government before it will enter into a contract for financial assistance for said Area with the Local Public Agency under Title I; and

WHEREAS, the rules and regulations prescribed by the Federal Government pursuant to Title I require that the conditions under which the Local Public Agency will make relocation payments in connection with the Urban Renewal undertakings and activities contemplated by the application be officially approved by the Local Public Agency; and

WHEREAS, the City Council of the City of Yonkers herein called the "Governing Body") has, by Resolution No. 265-1972 adopted June 27, 1972, found N.D.P. Area No. 4 appropriate for urban renewal as defined in Section 502(3) of Article 15 of the General Municipal Law of the State of New York, as amended, and designated said Area an urban renewal area pursuant to Section 504 of such Law; and

WHEREAS, there was presented to this meeting of the Local Public Agency, for its consideration and approval, a copy of the Urban Renewal Plan for N.D.P. Area No. 4 (herein called the "Urban Renewal Plan"), dated May 31, 1972, which Urban Renewal Plan is entitled "Yonkers Neighborhood Development Program Urban Renewal Plan for N.D.P. Area No. 4" and consists of 9 pages and 3

exhibits and a set of conditions under which the Local Public Agency will make relocation payments, which set of conditions is set forth in the Relocation Program attached hereto and marked for the urban renewal activities contemplated by the application; and

WHEREAS, the Urban Renewal Plan and the conditions under which the Local Public Agency will make relocation payments, were reviewed and considered at the meeting; and

WHEREAS, Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin under any program or activity receiving Federal financial assistance and Executive Order 11063 prohibits discrimination on the basis of race, color, creed or national origin in the sale, lease or other disposition of residential property (including land intended for residential use) or in the use or occupancy thereof;

NOW, THEREFORE, BE IT RESOLVED BY THE YONKERS URBAN RENEWAL AGENCY:

1. That the conditions under which the Local Public Agency will make relocation payments are hereby in all respects approved.

2. That the Urban Renewal Plan is hereby in all respects approved and the Secretary of the Agency is hereby directed to file a certified copy of the Urban Renewal Plan with the minutes of this meeting.

3. That it is hereby found and determined that the objectives of the Urban Renewal Plan cannot be achieved through rehabilitation of the urban renewal area.

4. That the United States of America and the Secretary of Housing and Urban Development be, and they are hereby, assured of full compliance by the Local Public Agency with regulations of the Department of Housing

and Urban Development effectuating Title VI of the Civil Rights Act of 1964 and applicable Executive Orders.

5. That the Director of Urban Renewal is hereby designated to approve all claims for relocation payments.

ADOPTED by the Yonkers Urban Renewal Agency at a meeting held on August 3, 1972, by unanimous vote of the members of the Agency present. A legal quorum was present throughout the meeting.

I, W. JAN CHONG, the duly authorized Secretary of the Yonkers Urban Renewal Agency, do hereby certify that the foregoing resolution is a true and exact copy of a resolution adopted by the Yonkers Urban Renewal Agency at a meeting held on the 3rd day of August, 1972; that a legal quorum was present throughout the meeting; and that said resolution appears in the official minutes of the Agency.

W. JAN CHONG
Secretary

NDP Area 4

Beginning at a point which is the northwest corner of lot 32, block 2011; thence easterly along the south right-of-way line of Ashburton Avenue to its intersection with the west right-of-way line of Warburton Avenue; thence southerly along the west right-of-way line of Warburton Avenue to the southeast corner of lot 5, block 2016; thence westerly along the southern boundary of lot 5, block 2016, to its intersection with the east right-of-way line of Woodworth Avenue; thence southerly along the east right-of-way line of Woodworth Avenue to its intersection with the easterly extension of the southern boundary of lot 1, block 2008; thence westerly along the easterly extension of the southern boundary of lot 1 in

block 2008, across Woodworth Avenue to its intersection with the west right-of-way line of Woodworth Avenue; thence northerly along the west right-of-way line of Woodworth Avenue to the southeast corner of lot 30, block 2011; thence westerly along the southern boundary of lot 30, block 2011, to the southwest corner of lot 30, block 2011; thence northerly along a line formed by the western boundary lines of lots 30 and 32, block 2011, to the northwest corner of lot 32, block 2011, which is the point and place of beginning.

**Resolution of the Planning Board of the City of Yonkers
Approving the Urban Renewal Plan for N.D.P. Area
No. 4 in the Neighborhood Development Program
No. N.Y. A-4.**

RESOLUTION—1972—URBAN RENEWAL

WHEREAS, the City Council of the City of Yonkers (herein called the "City Council") has, by Resolution No. 265-1972 adopted June 27, 1972, found an area more fully described in Exhibit A attached hereto and made a part hereof (herein called "N.D.P. Area No. 4") appropriate for urban renewal as defined in Section 502(3) of Article 15 of the General Municipal Law of the State of New York, as amended, and designated said Area an urban renewal area pursuant to Section 504 of such Law; and

WHEREAS, the Yonkers Urban Renewal Agency (herein called the "Local Public Agency") has prepared an Urban Renewal Plan for N.D.P. Area No. 4 dated May 31, 1972 (herein called the "Urban Renewal Plan") which Urban Renewal Plan is entitled "Yonkers Neighborhood Development Program Urban Renewal Plan For N.D.P.

Area No. 4", and submitted the Urban Renewal Plan to the Planning Board of the City of Yonkers (herein called the "Planning Board") pursuant to Section 505(2) of Article 15 of the General Municipal Law of the State of New York, as amended; and

WHEREAS, Section 505 (2) of Article 15 of the General Municipal Law of the State of New York, as amended, requires that the Planning Board hold a public hearing on due notice with respect to the Urban Renewal Plan and submit its report to the City Council, not later than ten weeks from the date of referral of the Urban Renewal Plan to it, certifying its unqualified approval, its disapproval, or its qualified approval with recommendations for modifications therein; and

WHEREAS, in accordance with the provisions of Section 505(2) of Article 15 of the General Municipal Law of the State of New York, as amended, the Planning Board has held a public hearing on due notice on August 14, 1972, to consider approval of the Urban Renewal Plan;

NOW, THEREFORE, BE IT RESOLVED BY THE PLANNING BOARD OF THE CITY OF YONKERS:

1. That the Urban Renewal Plan for N.D.P. Area No. 4, dated May 31, 1972, entitled "Yonkers Neighborhood Development Program Urban Renewal Plan For N.D.P. Area No. 4", having been duly reviewed and considered, is hereby unqualifiedly approved and the Secretary of the Planning Board is hereby directed to file a certified copy of the Urban Renewal Plan with the minutes of this meeting.

2. That the Urban Renewal Plan conforms to the comprehensive community plan for the development of the municipality as a whole, is consistent with local objectives, complies with the provisions of Section 502(7) of Article 15 of the General Municipal Law of the State of

New York, as amended, and conforms to the finding made pursuant to Section 504 of such Law.

3. That the Planning Director shall immediately submit a certified copy of this resolution to the City Council.

N.D.P. Area No. 4

Beginning at a point which is the northwest corner of lot 32, block 2011; thence easterly along the south right-of-way line of Ashburton Avenue to its intersection with the west right-of-way line of Warburton Avenue; thence southerly along the west right-of-way line of Warburton Avenue to the southeast corner of lot 5, block 2016; thence westerly along the southern boundary of lot 5, block 2016, to its intersection with the east right-of-way line of Woodworth Avenue; thence southerly along the east right-of-way line of Woodworth Avenue to its intersection with the easterly extension of the southern boundary of lot 1, block 2008; thence westerly along the easterly extension of the southern boundary of lot 1 in block 2008, across Woodworth Avenue to its intersection with the west right-of-way line of Woodworth Avenue; thence northerly along the west right-of-way line of Woodworth Avenue to the southeast corner of lot 30, block 2011; thence westerly along the southern boundary of lot 30, block 2011, to the southwest corner of lot 30, block 2011; thence northerly along a line formed by the western boundary lines of lots 30 and 32, block 2011, to the northwest corner of lot 32, block 2011, which is the point and place of beginning.

Resolution No. 363-1972 of the Yonkers City Council.

BY ENTIRE COUNCIL:

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF YONKERS APPROVING THE URBAN RENEWAL PLAN AND THE FEASIBILITY OF RELOCATION FOR N.D.P. AREA NO. 4 IN NEIGHBORHOOD DEVELOPMENT PROGRAM NO. N. Y. A-4 (OTIS).

WHEREAS, under the provisions of Title I of the Housing Act of 1949, as amended, the Secretary of Housing and Urban Development is authorized to provide financial assistance to Local Public Agencies for undertaking and carrying out Neighborhood Development Programs; and

WHEREAS, it is provided in such Act that contracts for financial aid thereunder shall require that the Urban Renewal Plans for the respective urban renewal areas comprising the Neighborhood Development Program be approved by the governing body of the locality in which the areas are situated and that such approval include findings by the governing body that: (1) the financial aid to be provided in the contracts is necessary to enable the Program to be undertaken in accordance with the Urban Renewal Plans; (2) the Urban Renewal Plans will afford maximum opportunity, consistent with the sound needs of the locality as a whole, for the rehabilitation or redevelopment of the urban renewal areas by private enterprise; (3) the Urban Renewal Plans conform to a general plan for the development of the locality as a whole; and (4) the Urban Renewal Plans give due consideration to the provision of adequate park and recreational areas and facilities, as may be desirable for neighborhood improvement, with special consideration for the health, safety, and welfare of children residing in the general vicinity of the sites covered by the Plans; and

WHEREAS, it is desirable and in the public interest that the Yonkers Urban Renewal Agency (herein called the "Local Public Agency") undertake and carry out the Neighborhood Development Program (herein called the "Program") identified as "Yonkers Neighborhood Development Program No. N. Y. A-4" for an additional urban renewal area in the City of Yonkers, State of New York (herein called the "Municipality"), said urban renewal area being more fully described in Exhibit A attached hereto and made a part hereof and herein called "N.D.P. Area No. 4"; and

WHEREAS, the Local Public Agency has applied for financial assistance under such Act and proposes to enter into a contract or contracts with the Department of Housing and Urban Development for the undertaking of, and for making available financial assistance for N.D.P. Area No. 4 in the Program; and

WHEREAS, the Local Public Agency has made studies of the location, physical condition of structures, land use, environmental influences, and social, cultural and economic conditions of N.D.P. Area No. 4 and has determined that said Area is a substandard and insanitary area and that it is detrimental and a menace to the safety, health, and welfare of the inhabitants and users thereof and of the Municipality at large, and the members of the City Council of the City of Yonkers (herein called the "Governing Body") have been fully apprised by the Local Public Agency and are aware of these facts and conditions; and

WHEREAS, the Governing Body has, by Resolution No. 265—1972 adopted June 27, 1972, found N.D.P. Area No. 4 appropriate for urban renewal as defined in Section 502(3) of Article 15 of the General Municipal Law of the State of New York, as amended, and designated said Area an urban renewal area pursuant to Section 504 of such Law; and

WHEREAS, there has been prepared and referred to the Governing Body for review and approval an Urban Renewal Plan for N.D.P. Area No. 4 dated May 31, 1972 (herein called "Urban Renewal Plan"), entitled "Yonkers Neighborhood Development Program Urban Renewal Plan for N.D.P. Area No. 4" consisting of 9 pages and 3 exhibits; and

WHEREAS, the Urban Renewal Plan has been approved by the Local Public Agency by Resolution No. 55—1972 adopted August 3, 1972; and

WHEREAS, a general plan (which is a comprehensive community plan for the development of the Municipality as a whole) has been prepared and is recognized and used as a guide for the general development of the Municipality as a whole; and

WHEREAS, the Planning Board of the City of Yonkers (herein called the "Planning Board"), which is the duly designated and acting official planning body for the Municipality, has, after a public hearing held on due notice on August 14, 1972, pursuant to Section 505(2) of Article 15 of the General Municipal Law of the State of New York, as amended, unqualifiedly approved the Urban Renewal Plan by resolution adopted August 14, 1972, and has submitted to the Governing Body its report and recommendations respecting the Urban Renewal Plan and has certified that the Urban Renewal Plan conforms to the comprehensive community plan for development of the Municipality as a whole, is consistent with local objectives, complies with the provisions of Section 502(7) of Article 15 of the General Municipal Law of the State of New York, as amended, and conforms to the finding made pursuant to Section 504 of such Law, and the Governing Body has duly considered the report, recommendations, and certification of the Planning Board; and

WHEREAS, the Local Public Agency has prepared and submitted a program for the relocation of individuals and families that may be displaced as a result of carrying out the Program in accordance with the Urban Renewal Plan; and

WHEREAS, there have also been presented to the Governing Body information and data respecting the relocation program which has been prepared by the Local Public Agency as a result of studies, surveys, and inspections in N.D.P. Area No. 4 and the assembling and analysis of the data and information obtained from such studies, surveys, and inspections; and

WHEREAS, the members of the Governing Body have general knowledge of the conditions prevailing in N.D.P. Area No. 4 and of the availability of proper housing in the Municipality for the relocation of individuals and families that may be displaced by the Program and, in the light of such knowledge of local housing conditions have carefully considered and reviewed such proposals for relocation; and

WHEREAS, it is necessary that the Governing Body take appropriate official action respecting the relocation program and the Urban Renewal Plan, in conformity with the contract for financial assistance between the Local Public Agency and the United States of America, acting by and through the Secretary of Housing and Urban Development; and

WHEREAS, the Governing Body is cognizant of the conditions that are imposed in the undertaking and carrying out of urban renewal activities and undertaking with Federal financial assistance under Title I, including those prohibiting discrimination because of race, color, creed, or national origin; and

WHEREAS, in accordance with the provisions of Section 505(3) of Article 15 of the General Municipal Law of the State of New York, as amended, the Governing Body has, not earlier than four weeks after the report of the Planning Board was received by the Governing Body, held a public hearing on due notice on September 12, 1972, to consider approval of the Urban Renewal Plan;

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF YONKERS:

1. That it is hereby found and determined that N.D.P. Area No. 4 is a substandard or insanitary area (as said term is defined in Section 502(4) of Article 15 of the General Municipal Law of the State of New York, as amended) or is in danger of becoming a substandard or insanitary area and tends to impair or arrest the sound growth and development of the Municipality.

2. That the Urban Renewal Plan, having been duly reviewed and considered, is hereby approved, and the City Clerk be and is hereby directed to file said copy of the Urban Renewal Plan with the minutes of the meeting.

3. That it is hereby found and determined that where clearance is proposed that the objectives of the Urban Renewal Plan cannot be achieved through rehabilitation of portions of N.D.P. Area No. 4.

4. That it is hereby found and determined that the Urban Renewal Plan conforms to the comprehensive community plan for the development of the Municipality as a whole.

5. That it is hereby found and determined that the financial aid to be provided pursuant to the contract for Federal Financial assistance pertaining to N.D.P. Area No. 4 is necessary to enable the Program to be undertaken in accordance with the Urban Renewal Plan.

6. That it is hereby found and determined that the Urban Renewal Plan will afford maximum opportunity, consistent with the sound needs of the Municipality as a whole, for the renewal of N.D.P. Area No. 4 by private enterprise.

7. That it is hereby found and determined that the Urban Renewal Plan affords maximum opportunity to private enterprise, consistent with the sound needs of the Municipality as a whole, for the undertaking of an urban renewal program.

8. That it is hereby found and determined that the Urban Renewal Plan gives due consideration to the provision of adequate park and recreational areas and facilities, as may be desirable for neighborhood improvement, with special consideration for the health, safety, and welfare of children residing in the general vicinity of the site covered by the Urban Renewal Plan.

9. That it is hereby found and determined that there is a feasible method for the relocation of families and individuals displaced from N.D.P. Area No. 4 into decent, safe and sanitary dwellings, which are or will be provided in N.D.P. Area No. 4 or in other areas not generally less desirable in regard to public utilities and public and commercial facilities, at rent or prices within the financial means of such families or individuals, and reasonably accessible to their places of employment.

10. That it is hereby found and determined that the Program for the proper relocation of individuals and families displaced in carrying out the Urban Renewal Plan in decent, safe, and sanitary dwellings in conformity with acceptable standards is feasible and can be reasonably and timely effected to permit the proper prosecution and completion of the Urban Renewal Plan; and that such dwellings or dwelling units available or to be

made available to such displaced individuals and families, are at least equal in number to the number of displaced individuals and families, are not generally less desirable in regard to public utilities and public and commercial facilities than the dwellings of the displaced individuals and families in N.D.P. Area No. 4, are available at rents or prices within the financial means of the displaced individuals and families, and are reasonably accessible to their places of employment.

11. That, in order to implement and facilitate the effectuation of the Urban Renewal Plan hereby approved, it is hereby found and determined that certain official action must be taken by the Governing Body with reference, among other things, to changes in zoning, the vacating and removal of streets, alleys, and other public ways, the establishment of new street patterns, the location and relocation of sewer and water mains and other public facilities, and other public action, and accordingly, the Governing Body hereby (a) pledges its cooperation in helping to carry out the Urban Renewal Plan, (b) requests the various officials, departments, boards, and agencies of the Municipality having administrative responsibilities in the premises likewise to cooperate to such end and to exercise their respective functions and powers in a manner consistent with the Urban Renewal Plan, and (c) stands ready to consider to take appropriate action upon proposals and measures designed to effectuate the Urban Renewal Plan.

12. That it is hereby found and determined that financial assistance under the provisions of Title I of the Housing Act of 1949, as amended, is necessary to enable the land in N.D.P. Area No. 4 to be renewed in accordance with the Urban Renewal Plan, and accordingly, the Program and the annual increment are approved and the Local Public Agency is authorized to file an application for financial assistance under Title I.

13. That it is hereby found and determined that the undertaking and carrying out of the urban renewal activities in N.D.P. Area No. 4 in stages is in the best public interest and will not cause any additional or increased hardship to the residents of such area.

EXHIBIT "A"

N.D.P. Area No. 4

Beginning at a point which is the northwest corner of lot 32, block 2011; thence easterly along the south right-of-way line of Ashburton Avenue to its intersection with the west right-of-way line of Warburton Avenue; thence southerly along the west right-of-way line of Warburton Avenue to the southeast corner of lot 5, block 2016; thence westerly along the southern boundary of lot 5, block 2016, to its intersection with the east right-of-way line of Woodworth Avenue; thence southerly along the east right-of-way line of Woodworth Avenue to its intersection with the easterly extension of the southern boundary of lot 1, block 2008; thence westerly along the easterly extension of the southern boundary of lot 1 in block 2008, across Woodworth Avenue to its intersection with the west right-of-way line of Woodworth Avenue; thence northerly along the west right-of-way line of Woodworth Avenue to the southeast corner of lot 30, block 2011; thence westerly along the southern boundary of lot 30, block 2011, to the southwest corner of lot 30, block 2011; thence northerly along a line formed by the western boundary lines of lots 30 and 32, block 2011, to the northwest corner of lot 32, block 2011, which is the point and place of beginning.

ADOPTED by the City Council of the City of Yonkers at a stated meeting held September 26th, 1972; by a vote of 13-0;

WILFRED E. WALKER
Deputy City Clerk

Notice of Appeal to the United States Supreme Court.

COURT OF APPEALS,

STATE OF NEW YORK.

Parcel I.

YONKERS COMMUNITY DEVELOPMENT AGENCY,

Plaintiff-Respondent,

against

WILLIAM T. MORRIS, JR., MARY BERENICE MCCALL, THOMAS Q. MORRIS, M. D., FINECAP REALTY COMPANY, a partnership, LINCOLN SAVINGS BANK OF BROOKLYN,

Defendants,

Relative to acquiring certain real property situate in the City of Yonkers, County of Westchester, State of New York.

Parcel II.

YONKERS COMMUNITY DEVELOPMENT AGENCY,

Plaintiff-Respondent,

against

DAB-O-MATIC CORP. and GAZETTE PRESS, Inc.,

Defendants-Appellants,

and

WILLIAM T. MORRIS, JR., MARY BERENICE MCCALL, THOMAS Q. MORRIS, M. D., FINECAP REALTY COMPANY, a partnership, LINCOLN SAVINGS BANK OF BROOKLYN, CLOVER WIRE FORMING CO., Inc., WOODHAVEN DRESS CO., Inc.,

Defendants,

Relative to acquiring certain real property situate in the City of Yonkers, County of Westchester, State of New York.

Index No. 7296/73

Parcel III.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,
against

WILLIAM T. MORRIS, Jr., MARY BERENICE MCCALL, THOMAS
 Q. MORRIS, M. D., FINECAP REALTY COMPANY, a part-
 nership, LINCOLN SAVINGS BANK OF BROOKLYN, JOHN
 JOHNSON, J. BEST, S. WATLINGTON and RICHARD R.
 EARLS,
Defendants,

Relative to acquiring certain real property situate in
 the City of Yonkers, County of Westchester, State of
 New York.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,
against

LESTER WEINBERG, individually and doing business as
 Great Eastern Metal Products Co.,
Defendant-Appellant,

Relative to acquiring certain real property situate in the
 City of Yonkers, County of Westchester, State of New
 York.

Index No. 7357/73

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,
against

MARY BARCA as executrix of the Last Will and Testa-
 ment of Thomas Barca, NANCY BARCA and ANGELO
 BARCA, Jr., all doing business as Barca Bros.,
Defendants-Appellants,
and

THE COUNTY TRUST COMPANY as Executor under the Last
 Will and Testament of Maitland Brenhouse, deceased,
Defendants,

Relative to acquiring certain real property situate in the
 City of Yonkers, County of Westchester, State of New
 York.

Index No. 7326/73

SIRS:

Please Take Notice, that the defendants, Gazette
 Press, Inc., Dab-O-Matic Corp., Lester Weinberg, Mary
 Barca as executrix of the Last Will and Testament of
 Thomas Barca, Nancy Barca and Angelo Barca, Jr.,
 hereby appeal to the Supreme Court of the United
 States from an order of the Court of Appeals of the
 State of New York, dated July 10, 1975, which affirmed
 an order of the Appellate Division on the 22nd day of
 July, 1974, which said order, Mr. Justice Fred Munder
 dissenting on a stated question of law affirmed the three

judgments of the Supreme Court in the above entitled action, entered in the office of the Clerk of the County of Westchester, dated October 24, 1973, October 23, 1973, and October 23, respectively, which judgments condemned certain real property in which of said defendants had substantial interests, without trial or hearing on the merits, despite the service of an answer by each of said defendants, and which judgments denied motions by each of the defendants to dismiss the respective petitions as insufficient in law and which judgments denied the defendants' motions for examinations before trial.

Please Take Further Notice, that the said defendants rely upon questions directly involving the construction of the Fourteenth Amendment of the United States Constitution, and the present appeal is taken as a matter of right, and that this appeal is taken pursuant to 28 U.S.C. §1257(2).

Please Take Further Notice, that the said defendants appeal from each and every part of the said order of said Court of Appeals of N. Y. State as well as from the whole thereof.

Dated: Bronxville, New York
August 13, 1975

WEKSTEIN, FRIEDMAN & FULFREE, Esqs.
Attorneys for defendants-appellants
Office and P. O. Address
55 Pondfield Road
Bronxville, New York 10708
914 961-7500

To:

Clerk of the Court of Appeals
of New York State
Eagle Street
Albany, New York

Clerk of the County of Westchester
County Courthouse
166 Main Street
White Plains, New York

Bennardo and Farrauto, Esqs.
Attorneys for plaintiff-respondent
Office and P. O. Address
53 South Broadway
Yonkers, New York

Order of Affirmance of New York Court of Appeals.

COURT OF APPEALS,

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 11th day of June in the year of our Lord one thousand nine hundred and seventy-five, before the Judges of said Court.

WITNESS,

The Hon. Charles D. Breitell, Chief Judge, Presiding.
Joseph W. Bellacosa, Clerk.

REMITTITUR July 10, 1975.

2

No. 340

Parcel I

IN THE MATTER

of

YONKERS COMMUNITY DEVELOPMENT AGENCY,

Respondent,

vs.

WILLIAM T. MORRIS, *et al.*,

Defendants,

Parcel II

YONKERS COMMUNITY DEVELOPMENT AGENCY,

Respondent,

vs.

DAB-O-MATIC CORP. and GAZETTE PRESS, Inc.,

Appellants,

and

WILLIAM T. MORRIS, Jr., *et al.*,

Defendants.

(and two other proceedings)

BE IT REMEMBERED, That on the 25th day of November in the year of our Lord one thousand nine hundred and seventy four Dab-O-Matic Corp. and Gazette Press, Inc., the appellants in this cause, came here unto the Court of Appeals, by Wekstein, Friedman & Fulfree, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Yonkers Community Development Agency, the respondent in said cause, afterwards appeared in said Court of Appeals by Bennardo & Ferrauto, its attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Morton N. Wekstein, of counsel for the appellants, and by Mr. Frank J. Bennardo, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

Opinion by Fuchsberg, J. All concur.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, &c., AS AFORESAID,

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices

thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

JOSEPH W. BELLACOSA
Clerk of the Court of Appeals of
State of New York.

Court of Appeals,
Clerk's Office,
Albany July 10, 1975.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

JOSEPH W. BELLACOSA
Clerk.

(Seal)

Judgment of Condemnation Pursuant to §13, Condemnation Law in the Matter of Barca (Parcel III).

At a Special Term, Part IV of the Supreme Court held in and for the County of Westchester at the County Courthouse, 166 Main Street, White Plains, New York on the 23rd day of October 1973.

Present:

Frank S. McCullough, Justice of the Supreme Court.

YONKERS URBAN RENEWAL AGENCY,

Plaintiff,

against

THOMAS BARCA, *et al.*,

Defendants.

Relative to acquiring certain real property situate in the City of Yonkers, County of Westchester, State of New York.

Index #7326/73

Upon reading and filing the Notice of Petition dated May 31, 1973, the Petition of Morton S. Yulish verified May 31, 1973, the *Lis Pendens* dated May 31, 1973, the Amended Petition of Morton S. Yulish verified July 3, 1973, the Answer of defendants Thomas Barca, Nancy Barca, and Angelo Barca, verified July 10, 1973, the Declaration of Plaintiff pursuant to Section 555 Subd. 2 of the General Municipal Law, verified July 10, 1973, the Order of Mr. Justice Anthony J. Cerrato, dated and

filed July 10, 1973, defendants Notice of Motion dated August 2, 1973, and all the Affidavits, papers, memoranda, and proceedings, heretofore had herein, and due deliberation having been had thereon, and Mr. Justice Frank S. McCullough having rendered his written decision dated October 9, 1973,

Now, upon motion of Bennardo & Farrauto, attorneys for the plaintiff it is:

ORDERED, that the motion of defendants, Thomas Barca, Nancy Barca, and Angelo Barca, for depositions pursuant to Section 408 of the Civil Practice Law and Rules, and for an order pursuant to Section 555 Subd. 2 of the General Municipal Law, fixing the time for surrender of possession, is in all respects denied, and it is further,

ORDERED, that the affirmative defenses contained in the answer of defendants, Thomas Barca, Nancy Barca, and Angelo Barca, are dismissed, and it is further,

ORDERED, that the property described in the Verified Petition, and hereinafter more particularly bounded and described, is necessary for the public use specified in the Verified Petition and the same is hereby adjudged condemned, and it is further,

ORDERED, that the plaintiff, having filed a Declaration pursuant to Chapter 357 of the Laws of 1972 (amending Section 555 of the General Municipal Law), and having deposited with the County Clerk of Westchester County, the amount of the estimated compensation stated in such Declaration, be and is hereby adjudged vested with title in fee simple of the property hereinafter described, and it is further,

ORDERED, that plaintiff be permitted to enter immediately upon the property herein condemned and to de-

vote the same to the public use described in the Verified Petition, and it is further

ORDERED, that upon due application of any of the parties in interest herein, the court may order that the money heretofore deposited by the plaintiff with the County Clerk of Westchester County, or any part thereof, be paid for or on account of the just compensation to be awarded in this proceeding, and it is further

ORDERED, that the just compensation to be awarded in this proceeding shall be established by a final judgment herein, and the said judgment shall include interest at the rate of six percent per year to the date of payment on the amount finally awarded as just compensation, but interest shall not be allowed on so much thereof as has already been paid into court by plaintiff, and no sum so paid into court shall be changed with any commission or poundage, and it is further

ORDERED, that Joseph Krouppa, Esq., residing at 8 Rudolph Terrace, Yonkers, New York; Michael Kablack, residing at 20 South Broadway, Yonkers, New York, and Peter Odomorik, residing at 299 Saw Mill River Road, Yonkers, New York, be, upon due qualification, appointed Commissioners of Appraisal, to ascertain the just compensation to be made to the owner for the property so taken and condemned, and it is further

ORDERED, that the first meeting of such Commissioners be held at the Office of the plaintiff, 53 South Broadway, Yonkers, New York, on the 19th day of November, 1973.

The property described in the Petition and herein condemned is more particularly bounded and described as follows:

All that certain lot, piece or parcel of land, situate, lying and being in the City of Yonkers, County of Westchester and State of New York, bounded and described as follows:

(Here follows metes & bounds description)

Dated: White Plains, New York
Oct. 23, 1973

Enter

HON. FRANK S. McCULLOUGH
J. S. C.

Judgment of Condemnation Pursuant to §13, Condemnation Law in the Matter of Weinberg (Parcel III).

At a Special Term, Part IV of the Supreme Court held in and for the County of Westchester at the County Courthouse, 166 Main Street, White Plains, New York on the 23rd day of October 1973.

Present:

Frank S. McCullough, Justice of the Supreme Court.

[SAME TITLE.]

Upon reading and filing the Notice of Petition dated June 13, 1973, the Petition of Morton S. Yulish verified June 13, 1973, the *Lis Pendens* dated June 13, 1973, the Amended Petition of Morton S. Yulish verified July 10, 1973, the Answer of Defendants Lester Weinberg and Great Eastern Metal Products Co., verified July 11, 1973, the Declaration of Plaintiff pursuant to Section 555 Subd. 2 of the General Municipal Law, verified July 10, 1973,

the Order of Mr. Justice Anthony J. Cerrato dated and filed July 10, 1973, defendants Notice of Motion dated August 2, 1973, and all the Affidavits, papers, memoranda, and proceedings, heretofore and herein, and due deliberation having been had thereon, and Mr. Justice Frank S. McCullough having rendered his written decision dated October 9, 1973.

Now, upon motion of Bennardo & Farrauto, Attorneys for the Plaintiff it is:

ORDERED, that the motion of the defendant, Lester Weinberg for depositions pursuant to Section 408 of the Civil Practice Law and Rules, and for an order pursuant to Section 555 Subd. 2 of the General Municipal Law, fixing the time for surrender of possession, is in all respects denied, and it is further,

ORDERED, that the affirmative defenses contained in the answer of defendant, Lester Weinberg are dismissed, and it is further,

ORDERED, that the property described in the Verified Petition and hereinafter more particularly bounded and described, is necessary for the public use specified in the Verified Petition and the same is hereby adjudged condemned, and it is further,

ORDERED, that the plaintiff, having filed a Declaration pursuant to Chapter 357 of the Laws of 1972 (amending Section 55 of the General Municipal Law), and having deposited with the County Clerk of Westchester County, the amount of the estimated compensation stated in such Declaration, be and is hereby adjudged vested with title in fee simple of the property hereinafter described, and it is further,

ORDERED, that plaintiff be permitted to enter immediately upon the property herein condemned and to devote the same to the public use described in the Verified Petition, and it is further

ORDERED, that upon due application of any of the parties in interest herein, the court may order that the money heretofore deposited by the plaintiff with the County Clerk of Westchester County, or any part thereof, be paid for or on account of the just compensation to be awarded in this proceeding, and it is further

ORDERED, that the just compensation to be awarded in this proceeding shall be established by a final judgment herein, and the said judgment shall include interest at the rate of six percent per year to the date of payment on the amount finally awarded as just compensation, but interest shall not be allowed on so much thereof as has already been paid into court by plaintiff, and no sum so paid into court shall be changed with any commission or poundage, and it is further

ORDERED, that Paul Miklaus, Esq., residing at 17 Holley Street, Yonkers, New York; Fred J. Martin, Sr., residing at 64 Hughes Terrace, Yonkers, New York, and Andrew Hayduk, residing at 135 Lockwood Avenue, Yonkers, New York be, upon due qualification, appointed Commissioners of Appraisal, be ascertain the just compensation to be made to the owner of the property so taken and condemned, and it is further

ORDERED, that the first meeting of such Commissioners be held at the Office of the plaintiff, 53 South Broadway, Yonkers, New York, on the 16th day of November, 1973.

The property described in the Petition and herein condemned is more particularly bounded and described as follows:

(Here follows a metes and bounds description)

Dated: White Plains, New York
Oct. 23, 1973

Enter

HON. FRANK S. McCULLOUGH
J. S. C.

Judgment of Condemnation Pursuant to §13, Condemnation Law in the Matter of Dab-O-Matic Corp. and Gazette Press, Inc. (Parcel II).

At a Special Term, Part IV, of the Supreme Court of the State of New York, held in and for the County of Westchester, at the County Court House in the City of White Plains, New York on the 24th day of October, 1973.

Present:

Hon. Frank S. McCullough, Justice.

[SAME TITLES.]

Upon reading and filing the Notice of Petition dated June 7, 1973, the petition of Morton S. Yulish, verified June 7, 1973, the amended petition of Morton S. Yulish, verified July 10, 1973, the answer of defendants William T. Morris, Jr., Mary Berenice McCall, and Thomas Q. Morris, verified July 20, 1973 wherein said defendants, owners of the three parcels described herein, have consented to the condemnation and who have agreed to an amount of just compensation for the within condemnation as set forth in their verified answer, and the two leases hereinafter referred to and the contract dated May 15, 1973 between Plaintiff and the Defendants Morris, the answer of defendants' tenants Dab-O-Matic Corp., and Gazette Press, Inc., verified July 20, 1973, and the notice of motions of said defendants' tenants dated August 2, 1973 and all the affidavits, papers, memoranda and proceedings heretofore had herein and due deliberation having been had thereon and Mr. Justice Frank S. McCullough having rendered his written decision dated October 9, 1973.

Now, upon motion of Bennardo & Farrauto, Attorneys for the plaintiff, it is

ORDERED, that the motion of the defendants Dab-O-Matic, Corp. and Gazette Press, Inc., for depositions pursuant to section 408 of the Civil Practice Law and Rules is in all respects denied; and it is further

ORDERED, that the affirmative defenses contained in the answer of defendants, Dab-O-Matic Corp., and Gazette Press, Inc., are dismissed; and it is further

ORDERED, that the property described in the Verified Petition, and herein more particularly bounded and described, is necessary for the public use specified in the Verified Petition and the same is hereby adjudged condemned, and that plaintiff is vested with title in fee simple of said property; and it is further

ORDERED, that the defendants William T. Morris, Jr., Mary Berenice McCall, and Thomas Q. Morris, be awarded the total sum of \$700,000. plus interest as provided by the agreement between said defendants and plaintiff dated May 15, 1973 as fair and just compensation for the property herein condemned and the sum of \$3,880. plus interest as provided by the agreement between said defendants and plaintiff dated May 15, 1973 for fixtures and that said defendants owner be paid said amounts (less the amounts payable to discharge valid mortgages and liens other than leases) in accordance with the said agreement between the plaintiff and said defendants—owners dated May 15, 1973 free and clear of all claims of the defendants Dab-O-Matic Corp., and Gazette Press, Inc.; and it is further

ORDERED, that said compensation be made by plaintiff to the defendants William T. Morris, Jr., Mary Berenice McCall, and Thomas Q. Morris; and it is further

ORDERED, that upon payment of said compensation plaintiff thereupon be permitted to enter immediately upon the property herein condemned and to devote the same to the public use described in the verified petition; and it is further

ORDERED, that the term of the lease dated July 22, 1960 between William T. Morris and Berenice Q. Morris, Landlord, and Gazette Press, Inc., Tenant, affecting a portion of Parcel C for a term ending June 30, 1965, as renewed and extended to June 30, 1975 under the same terms, covenants and conditions of said lease, with an option to further extend the term to June 30, 1980, is hereby ended and terminated and Tenant shall have no claim against William T. Morris and Berenice Q. Morris and shall have no claim against the defendants William T. Morris, Jr., Mary Berenice McCall and Thomas Q. Morris, M. D., and shall have no claim against Plaintiff for the value of any unexpired term and said tenant shall receive no compensation for its said leasehold interest; and it is further

ORDERED, that the term of the lease dated July 31, 1968 between William T. Morris, Landlord, and Dab-O-Matic Corp., Tenant, affecting a portion of Parcel C for a term ending October 31, 1973 and renewed and extended to October 31, 1978 under the same terms, covenants and conditions of said lease, is hereby ended and terminated, and Tenant shall have no claim against William T. Morris and shall have no claim against the defendants William T. Morris, Jr., Mary Berenice McCall and Thomas Q. Morris, M. D., and shall have no claim against Plaintiff for the value of any unexpired term and said tenant shall receive no compensation for its said leasehold interest; and it is further

ORDERED, that the answer of defendants, Dab-O-Matic Corp., and Gazette Press, Inc. be dismissed; and it is further

ORDERED, that the plaintiff and the defendants, William T. Morris, Jr., Mary Berenice McCall and Thomas Q. Morris, M. D., may apply to the court at the foot of this order for any other or future order or judgment or make any other application or institute any proceeding necessary or proper to carry into effect the provisions of this order with respect to interest and fixtures.

The property described in the petition and herein condemned is more particularly bounded and described as follows:

(Here follows a metes and bounds description)

Enter

FRANK S. McCULLOUGH
Justice of the Supreme Court

NOV 6 1975

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-542

Parcel I.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,
against

WILLIAM T. MORRIS, JR., MARY BERENICE McCALL, THOMAS
Q. MORRIS, M. D., FINECAP REALTY COMPANY, a partnership,
LINCOLN SAVINGS BANK OF BROOKLYN,
Defendants,

Relative to acquiring certain real property situate in the City of Yonkers,
County of Westchester, State of New York.

Parcel II.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,
against

DAB-O-MATIC CORP. and GAZETTE PRESS, INC.,
Defendants-Appellants,
and

WILLIAM T. MORRIS, JR., MARY BERENICE McCALL, THOMAS
Q. MORRIS, M. D., FINECAP REALTY COMPANY, a partnership,
LINCOLN SAVINGS BANK OF BROOKLYN, CLOVER WIRE
FORMING CO., INC., WOODHAVEN DRESS CO., INC.,
Defendants,

Relative to acquiring certain real property situate in the City of Yonkers,
County of Westchester, State of New York.

Index No. 7296/73.

Parcel III.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,
against

WILLIAM T. MORRIS, JR., MARY BERENICE McCALL, THOMAS
Q. MORRIS, M. D., FINECAP REALTY COMPANY, a partnership,
LINCOLN SAVINGS BANK OF BROOKLYN, JOHN JOHNSON,
J. BEST, S. WATLINGTON and RICHARD R. EARLS,
Defendants,

Relative to acquiring certain real property situate in the City of Yonkers,
County of Westchester, State of New York.

(Continued on Back of Cover)

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,
against

LESTER WEINBERG, individually and doing business as
GREAT EASTERN METAL PRODUCTS Co.,
Defendant-Appellant,

Relative to acquiring certain real property situate in the City of Yonkers,
County of Westchester, State of New York.

Index No. 7357/73.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,
against

MARY BARCA as executrix of the Last Will and Testament of THOMAS
BARCA, NANCY BARCA and ANGELO BARCA, Jr., all doing busi-
ness as BARCA BROS.,
Defendants-Appellants,

and

THE COUNTY TRUST COMPANY as Executor under the Last Will
and Testament of MAITLAND BRENHOUSE, deceased,
Defendant,

Relative to acquiring certain real property situate in the City of Yonkers,
County of Westchester, State of New York.

Index No. 7326/73.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

**BRIEF IN SUPPORT OF RESPONDENT'S MOTION TO
DISMISS THE APPEAL AND/OR TO AFFIRM THE
DECISION OF THE NEW YORK COURT OF
APPEALS**

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-542

Parcel I.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,
against

WILLIAM T. MORRIS, JR., MARY BERENICE McCALL, THOMAS
Q. MORRIS, M. D., FINECAP REALTY COMPANY, a partnership,
LINCOLN SAVINGS BANK OF BROOKLYN,
Defendants,

Relative to acquiring certain real property situate in the City of Yonkers,
County of Westchester, State of New York.

Parcel II.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,
against

DAB-O-MATIC CORP. and GAZETTE PRESS, INC.,
Defendants-Appellants,
and

WILLIAM T. MORRIS, JR., MARY BERENICE McCALL, THOMAS
Q. MORRIS, M. D., FINECAP REALTY COMPANY, a partnership,
LINCOLN SAVINGS BANK OF BROOKLYN, CLOVER WIRE
FORMING CO., INC., WOODHAVEN DRESS CO., INC.,
Defendants,

Relative to acquiring certain real property situate in the City of Yonkers,
County of Westchester, State of New York.

Index No. 7296/73.

Parcel III.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,
against

WILLIAM T. MORRIS, JR., MARY BERENICE McCALL, THOMAS
Q. MORRIS, M. D., FINECAP REALTY COMPANY, a partnership,
LINCOLN SAVINGS BANK OF BROOKLYN, JOHN JOHNSON,
J. BEST, S. WATLINGTON and RICHARD R. EARLS,
Defendants,

Relative to acquiring certain real property situate in the City of Yonkers,
County of Westchester, State of New York.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,
against

LESTER WEINBERG, individually and doing business as
GREAT EASTERN METAL PRODUCTS Co.,
Defendant-Appellant,

Relative to acquiring certain real property situate in the City of Yonkers,
County of Westchester, State of New York.

Index No. 7357/73.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,
against

MARY BARCA as executrix of the Last Will and Testament of THOMAS
BARCA, NANCY BARCA and ANGELO BARCA, Jr., all doing business as BARCA BROS.,
Defendants-Appellants,

and

THE COUNTY TRUST COMPANY as Executor under the Last Will
and Testament of MAITLAND BREHOUSE, deceased,
Defendant,

Relative to acquiring certain real property situate in the City of Yonkers,
County of Westchester, State of New York.

Index No. 7326/73.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

**BRIEF IN SUPPORT OF RESPONDENT'S MOTION TO
DISMISS THE APPEAL AND/OR TO AFFIRM THE
DECISION OF THE NEW YORK COURT OF
APPEALS**

Statement

This brief is filed in support of respondent's motion to dismiss the appeal from the New York State Court of Appeals and/or to affirm that decision.

Appellants and other defendants were personally served with the pleadings herein. Immediately after the commencement of the proceedings a Declaration of Taking

was filed by respondent with the Westchester County Clerk, together with a sum of money equal to respondent's opinion of the value of the land sought to be taken, all pursuant to Section 555(2) of the General Municipal Law of the State. Appellants served and filed their answer. Additional supporting affidavits were submitted. No trial or hearing was had. The Court dismissed the affirmative defenses of appellants and granted the relief requested in the petition. Appellants filed a notice of appeal and requested a stay of the enforcement of the judgments of condemnation. The request was denied. The Appellate Division of the New York Supreme Court affirmed the judgments of condemnation. The Court of Appeals of New York, by a unanimous court, also affirmed.

In the meantime, the taking of the land and demolition have occurred and the land has been turned over to a private developer, the Otis Elevator Company, for renewal and development.

Two of these appellants were tenants in a building taken. They have received from respondent money for fixtures and moving as follows: Gazette Press, Inc., \$10,000 for moving, \$250,213 for fixtures; Dab-O-Matic Corp., \$20,079 for moving, \$106,010, for fixtures. The Declarations of Taking were filed on July 12, 1973 for Barca and June 15, 1973 for the other appellants. The judgments of condemnation are dated October 23 and 24, 1973. The properties were given up, pursuant to the judgments, in June of 1974. The written lease term of Dab-O-Matic Corp. would have expired October 31, 1978. The written lease term of the Gazette Press, Inc. would have expired June 30, 1980.

Neither of the tenants disputed the money awarded for fixtures and moving expenses.

The fee-owner appellants withdrew from the Court on written stipulation, the money deposited by respondent as follows, Barca \$87,000, Weinberg \$57,000. In addition,

Barca received \$73,174 for fixtures and \$12,500 for moving. Weinberg received \$31,329 for fixtures and \$16,339 for moving. None of the awards for fixtures or moving were contested. The judgments of condemnation appointed commissioners of appraisal to determine the value of the property taken and the just compensation to be paid. The hearings in the *Barca* case have actually been completed. The appellants moved at Special Term in Westchester Supreme Court to confirm the decision of the commissioners. That Court confirmed the award by its written decision dated October 21, 1975. An appeal of that decision is presently being considered by this respondent. No determination of value has yet been made by the commissioners with respect to the other fee owner, *Weinberg*.

Questions Presented

Whether the within appeal has a requisite finality to be reviewable by this Court.

Whether the within appeal presents a substantial federal question.

POINT I

The judgment of the New York Court of Appeals is not so final so as to permit the appellants to invoke the jurisdiction of the United States Supreme Court.

The statute invoked by the appellants, 28 U.S.C. Section 1257(2), to sustain the jurisdiction of this Court provides that only *final* judgments or decrees of a state's highest Court may be reviewed by the Supreme Court.

In this case New York's highest Court has decided that there are no issues of fact which require a trial and that on the record before it the taking was for a sufficiently public purpose. This decision does not possess the requisite appealable finality.

It has been repeatedly held by this Court that a petition for review will not lie until there is a final judgment, disposing of the whole case. All rights in the litigation must have been adjudicated, whether of title or damages. A case will not be permitted to be sent up in fragments of successive appeals. *United States v. Young*, 94 U.S. 254; *Luxton v. North River Bridge Co.*, 147 U.S. 337; *McGourkey v. Toledo & Ohio Railway*, 146 W.U. 537.

A judgment will be considered final where a Court has made a decree fixing the rights and liabilities of the parties and refers the case to a master for a ministerial purpose only, and no further proceedings are contemplated. But if the Court making the judgment, refers the case to a lower Court or to the master as a subordinate Court, for a judicial purpose, upon which a further decree is to be entered, then the judgment is not final. *Forgay v. Conrad*, 6 How 201; *Lodge v. Tuell*, 135 U.S. 232.

A clear and distinct rule of finality has been established by this Court in cases involving the sovereign's exercise of the power of eminent domain. The rule is best stated in *Catlin v. United States*, 324 U.S. 229, where at page 233 the Court said:

"A 'final decision' generally is one which ends the litigation on the merit and leaves nothing for the court to do but execute the judgment. *St. Louis, I.M. & S.R. Co. v. Southern Express Co.*, 108 U.S. 24, 28. Hence, ordinarily in condemnation proceedings appellate review may be had only upon an order or judgment disposing of the whole case, and adjudicating all rights, including ownership and just compensation, as well as the right to take the property. This has been the repeated holding of decisions here. The rule applies to review by this Court of judgments of state courts, in advance of determination of just compensation, although by local statute 'judgments of condemnation,' i.e., of the right to condemn particular

property, are reviewable before compensation is found and awarded. *Wick v. Superior Court*, 278 U.S. 574, 575; *Public Service Co. v. Lebanon*, 305 U.S. 558, 671; cf. *Dieckmann v. United States*, 88 F.2d 902. The foundation of this policy is not in merely technical conceptions of 'finality'. It is one against piece-meal litigation. 'The case is not to be sent up in fragments . . .' *Luxton v. North River Bridge Co.*, 147 U.S. 337, 341. Reasons other than conservation of judicial energy sustain the limitation. One is elimination of delays caused by interlocutory appeals."

In this case there has been no adjudication of all of the rights of the parties. Just compensation has not been finally determined. That issue has been referred to commissioners for a trial after which a further judgment will be entered in the State courts. The matters to be tried by the commissioners are not ministerial. Mere execution of the judgment is not what is left to be done. The commissioners are charged with a judicial purpose involving the merits of the litigation and the constitutional rights of just compensation. *New York State Constitution, Article 1, Section 7*.

Appeals from a judgment entered on a decision of the commissioners is appealable and may involve constitutional issues reviewable by this Court. This is unlike the cases where after judgment, only a ministerial duty, such as an accounting, remains to be fulfilled. In those ministerial type cases, review is allowed of the adjudication that is completed because those ministerial type duties remaining to be completed could not remotely give rise to a federal question. However, in condemnation cases, what remains to be done after the entry of a judgment of condemnation is not ministerial and could give rise to federal questions reviewable by this Court.

See:

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120;

Grays Harbor Logging Company, et al. v. Coats-Fordney Logging Company, 243 U.S. 251;
Carondelet Canal & Nav. Co. v. Louisiana, 233 U.S. 362.

In the *Grays Harbor* case, op. cit., the appellants there argued as do the appellants here, that the judgment made by the state Court should be regarded as finally disposing of a distinct and definite branch of the case and leaving the issue of just compensation as a separate branch of the case. This appears to be the obvious thrust of appellants' jurisdictional statement notwithstanding the attempt therein to distinguish *Catlin, supra*. That argument was rejected there and should be rejected here. This is so even though the state Courts are bound by the decision of the state's highest Court as the law of the case. *Grays Harbor Logging Company, et al. v. Coats-Fordney Logging Company, supra*; *United States v. Denver & Rio Grande R.R.Co.*, 191 U.S. 84.

Like the judgment appealed from in the *Grays Harbor* case, this judgment, adjudicating that plaintiff-respondent had the right to acquire the land, is an interlocutory judgment under New York law. *Manhattan Ry.Co. v. Stroub*, 70 Hun. 363 (N.Y.). The appeal in the case at bar made to the Appellate Division of the Supreme Court in New York and to the Court of Appeals of New York are expressly denominated intermediate appeals by the Courts.

See:

Central Hudson Gas & Electric Corporation v. Newman, 35 A.D.2d 989, 317 N.Y.S.2d 887;
Great Neck Water Authority v. Citizens Water Supply Co. of Newtown, 12 N.Y.2d 167.

As such it is contemplated and expected that further appeals from judgments or orders on the merits may reach the Appellate Courts. It is precisely for this reason that the rule of finality in condemnation cases has been pre-

scribed. Otherwise there will be successive and fragmentary appeals to this Court.

It is a simple proposition that in condemnation cases there are federal questions that may arise through the trial on just compensation, which questions may be reviewable by this Court. This Court has said that we must wait until the litigation ends in the state courts before seeking review in the Supreme Court. Speaking for the Court in the *Radio Station WOW, Inc.* case, *supra*, Mr. Justice Frankfurter, at page 124, said:

"This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our Federal System."

In the case at Bar, appellants are not precluded from seeking review of any federal question that may now be presented. It is simply that they are here too early. They may return again upon the federal questions now raised, as well as any other federal questions that may be raised in the proceedings to come in the state Courts.

The fact that New York procedure permits review in the Appellate Courts of the State is not determinative of the appealability of the judgment in the Supreme Court. This Supreme Court is not bound by such rules in the state Courts. The right to appeal to this Court will not depend upon and vary with the fifty state procedures, *Catlin v. United States, supra*.

There is no possibility in this case that review now by this Court can prevent irreparable injury to these appellants. As the New York Court of Appeals has noted, the takings have occurred without hindrance and the buildings have been demolished. In addition, the appellants have received an amount of money equal to the respondent's opinion of the fair market value of the property taken. That opinion of value is disputed and the trials before the

commissioners have begun. The New York Appellate Courts have refused appellants' applications to stay the takings and demolition pending the appeal. Accordingly, those cases which permit review of judgments that appear interlocutory, because the losing party would suffer irreparable injury if review were unavailing, are not applicable. *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 61, 92 L.Ed. 1212.

The *Republic* case, *supra*, involved a judgment of the Oklahoma Supreme Court which upheld a determination of a state agency concerning the correlative rights of owners of Natural Gas drawn from a common source. The Oklahoma decision left open for future determination, the terms upon which gas may be taken and the rates that must be paid.

In considering the question of jurisdiction in the *Republic* case, the Supreme Court likened the case to the precedents set by this Court on the questions of jurisdiction in condemnation cases (p. 71).

The closing paragraphs of the Supreme Court's decision in *Republic* are determinative of the issue of jurisdiction in this case.

"The condemnation precedents attract this case more persuasively than do the accounting cases. Where it is claimed that a decree transferring property overrides an asserted federal right, as in *Forgay v. Conrad*, 6 How (US) 201, 12 L ed 404, and *Radio Station WOW v. Johnson*, 326 US 120, 89 L ed 2092, 65 S. Ct. 1475, both *supra*, no disposition of the subsequent accounting proceeding can possibly make up for the defeated party's loss, since the party who has lost the property must also pay to his opponent what the accounting decrees. Hence his desire to appeal the issue of the right to the property will almost certainly persist. On the other hand, in an eminent domain case, as in a case

like this, the fate of the whole litigation may well be affected by the fate of the unresolved contingencies of the litigation. An adequate award in an eminent domain case or a profitable rate in the case before us might well satisfy the losing party to acquiesce in the disposition of the earlier issue. It is of course not our province to discourage appeals. But for the soundest of reasons we ought not to pass on constitutional issues before they have reached a definitive stop. Another similarity between this case and the condemnation cases calls for abstention until what is organically one litigation has been concluded in the State. It is that the matters left open may generate additional federal questions. This brings into vivid relevance the policy against fragmentary review. In accounting cases, that which still remains to be litigated can scarcely give rise to new federal questions.

The policy against fragmentary review has therefore little bearing. But contests over valuation in eminent domain cases, as price-fixing in this type of case, are inherently provocative of constitutional claims. This potentiality of additional federal questions arising out of the same controversy has led this Court to find want of the necessary finality of adjudicated constitutional issues in condemnation decrees before valuation has been made. Like considerations are relevant here.

In short, the guiding considerations for determining whether the decree of the Court below possesses requisite finality lead to the conclusion that this case must await its culmination in the judicial process of the State before we can assume jurisdiction. 'Only one branch of the case has been finally disposed of below, therefore none of it is ripe for review by this court.' *Collins v. Miller*, 252 US 364, 371, 64 L ed 616, 619, 40 S. Ct. 37. This makes it unnecessary to consider whether the mere fact that the decree gave alternative

commands precluded it from being final. *Ct. Paducah v. East Tennessee Teleph. Co.*, 229 US 476, 57 L ed 1286, 33 S. Ct. 816; *Jones v. Craig (Barker v. Craig)*, 127 US 213, 32 L ed 147, 8 S. Ct. 1175; Note, 48 *Harv L Rev* 302, 306. Since the judgment now appealed from lacks the necessary finality, we cannot consider the merits. All of Republic's constitutional objections are of course saved."

The prior decision of this Court, being clear and unequivocal and reaffirmed time and again holding that appeals in condemnation cases, even from the highest state courts, but before compensation has been awarded do not have the requisite finality to invoke the jurisdiction of this Court, are determinative of that issue now presented and utterly foreclose any consideration of the merits at this time.

POINT II

The entry of a judgment of condemnation without a trial or evidentiary hearing is not a violation of the Fourteenth Amendment to the United States Constitution.

Sections 4, 5 and 6 of the Condemnation Law of New York outline the procedure for the commencement of condemnation proceedings. Section 4 sets forth with specificity what the petition must contain. The defendant in a condemnation proceeding will thus know, have notice of, the full identity of the condemnor, a detailed description of the real property sought to be taken, the public use for which the property is required, that the plaintiff has been unable to agree with defendant to purchase the property, the plaintiff's opinion of the value of the property, that all preliminary steps required by law have been taken, that plaintiff intends in good faith to complete the work and the relief requested. Section 5 provides that all the owners of the property be served

with the petition and a notice telling them where and when the petition will be presented. Section 6 provides that the petition and notice must be served as a summons would be served.

There is no dispute that these appellants have received the petition and notice in accordance with these Sections of the Condemnation Law.

Section 11 of the Condemnation Law provides that there shall be a trial of any factual issue that may be raised by the petition and answer.

Under New York law, condemnation proceedings are special proceedings and are thus governed by Article Four of the Civil Practice Law and Rules. *Iroquios Gas Corp. v. Gernatt*, 50 Misc.2d 1028, 272 N.Y.S.2d 291, aff'd. 28 A.D. 2d 811, aff'd. 22 N.Y.2d 694. Section 409(b) of the Civil Practice Law and Rules states:

"The Court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised."

Furthermore, in a condemnation case, the New York Court of Appeals held:

"... the standards of summary judgment applied to actions should be applied by the court to proceedings governed by CPLR 409 [b]."

See:

Port of New York Authority v. 62 Cortlandt St. Realty Co., 18 N.Y.2d 250 (p. 255); certiorari denied 385 U.S. 1006.

Thus it becomes clear that appellants' contention that the Courts of New York improperly treated the petition as an application for summary judgment is ill-founded. No new notice or new affidavit for the same relief is required under the New York procedure in condemnation

proceedings. The defendant-owner knew that when they are served with the original notice and petition that there could be a summary disposition of the proceeding without a trial.

The principle that summary disposition may be made by a Court in a condemnation case after service of the pleadings is so well settled that the New York Court of Appeals, in this case, did not see need to address itself to the issue.

The reason that appellants did not get a trial is because they failed to raise any triable issue of fact. They have clung to and have thrust upon the Court only "an untenable contention", see p. 9 Court of Appeals decision.

Coupled with appellant's attack upon the summary procedure authorized by New York law in these cases, is an attack upon Section 555 subd. (2) of the General Municipal Law of New York. That Section is an early-taking authorization granted to governments at the start of legal actions and universally providing for a deposit of money and opportunity for prompt judicial review.

The validity of such provisions has already been passed upon by this Court.

See:

United States v. Miller, 317 U.S. 369;

Catlin v. United States, 324 U.S. 229;

Great Falls Mfg. Co. v. Attorney General, 124 U.S. 581;

Backus v. Fort Street Union Depot Co., 169 U.S. 557;

Williams v. Parker, 188 U. 491;

Moody v. Jacksonville, 20 Fla. 597;

Palisade v. Orchard Mesa Irr. Dist., 85 Colo. 57;

City of Glen Cove v. Utilities and Industries Corporation, 17 N.Y.2d 205;

Schrader v. Third Judicial District, 58 Nev. 188.

The concept of early takings is recognized in other statutes in New York, Public Housing Law Section 125(2), Highway Law Section 30(3). See also District of Columbia Code Ann. Section 16-1353 (1971), 40 U.S.C. 403 (c) (National Recovery Act), 50 U.S.C. 171 (War Purposes Act), 48 U.S.C. 850 (Reindeer Industry Act).

All of these provisions, though swift and effective their application may be, are tempered with the inescapable safeguards of due process.

The New York statutory framework provides that a declaration of taking may be filed after the commencement of the proceeding, but before judgment; money equal to the taker's opinion of value must be deposited, no commission or poundage is to be charged against said deposit, the deposit earns interest, it may be withdrawn by the property owner. Section 555(2) Gen. Mun. Law. That Section also provides that the taker must file a sworn declaration containing detailed statements and that the Court shall have the power to fix the time within which and the terms upon which the owner shall be required to surrender possession. Furthermore, the amount of money deposited by the taker is not conclusive as to value. Value and just compensation may be disputed and litigated by the owner. Section 26 of the Condemnation Law empowers the Court before whom the proceeding may be pending,

" . . . to make all necessary orders and give necessary directions to carry into effect the object and intent of this chapter, and of the several acts conferring authority to condemn lands for public use, and the practice in such cases shall conform, as near as may be, to the ordinary practice in such court."

As a result of the various procedural safeguards which may result in the delay or prevention of acquisition of actual possession of the property by the taker notwithstanding the filing of a declaration of taking, this Court

has expressed the view that under such circumstances, the date of "taking" is the date on which the taker actually entered and appropriated the property to public use.

See:

United States v. Miller, 317 U.S. 369, p. 380-1;
United States v. 551.03 Acres of Land, 249 F. Supp. 253;
Covered Wagon Inc. v. C.I.R., 369 F.2d 629;
West, Inc. v. United States, 374 F.2d 218.

In the case at bar, the respondent entered into possession more than one year after the commencement of the proceeding and the filing of the declaration. It took possession of the land pursuant to a judgment of condemnation made by the New York Supreme Court and after the appellants had notice and opportunity to be heard. Section 555(2) Gen. Mun. Law was thus not the source of the authority to possess. The lawful process of the Court was.

Appellants' contentions that their property cannot be taken without a "pre-termination" or "pre-appropriation" hearing as it has been taken in this case, does not find support in so-called consumer and creditor type cases cited by them.

Fuentes v. Shevin, 407 U.S. 67, 32 L. Ed. 2d 556, permitted a secured installment creditor to repossess goods sold, without notice, without hearing, and without judicial order or supervision. Because carried out without notice and opportunity to be heard and without judicial participation, that kind of seizure was held violative of the Due Process Clause. Firstly, the case at bar is not like the *Fuentes* case. The appellants had notice, opportunity to be heard, a court order granting possession, and judicial supervision and participation. Secondly, the taker here is a governmental unit where the prospect of violence and resort to self help schemes to the injury of the victims are lessened if not avoided.

See:

Mitchell v. W. T. Grant Company, 94 S.Ct. 1895, p. 1905;

Adams v. Southern California First National Bank, 492 F.2d 324.

Even the *Fuentes* case stated the well-settled principle that due process requires notice and opportunity to be heard (p. 82). It does not require a hearing. *Bell v. Burson*, 402 U.S. 535. Naturally a hearing will be had if the pleadings raise an issue of fact. In the case at bar there is no issue of fact, only "an untenable contention".

Sniadach v. Family Assistance Corp., 395 U.S. 337, 23 L. Ed. 2d 349, involved pre-judgment garnishment of wages. That Court said that that situation presented "a specialized type of property presenting distinct problems in our economic system". 395 U.S. p. 340.

Goldberg v. Kelly, 397 U.S. 254, 25 L. Ed. 2d 287, involved summary termination of welfare benefits without opportunity to contest determination, also a specialized type of property.

In short, these cases are constitutionally distinguishable from the case at bar. This proposition is supported by the more recent decision of this Court in *Mitchell v. W. T. Grant Company*, 94 S. Ct. 1895 (1974). That case involved the validity of sequestration of property upon a creditor's *ex parte* application to a Court and the filing of a bond by the creditor. The Louisiana statute there in question authorized the *ex parte* sequestration order but directed the issuance of a citation and the writ of sequestration to the debtor citing him to file pleadings or make an appearance within 5 days. The citation recited the filing of the writ, the affidavit of the creditor, the order and the bond. This Court did not find that procedure violative of due process.

In the case at Bar, the condemnation action is begun first, a petition and notice are served, a copy of the declaration to be filed was attached to the petition and money is deposited. No possession is taken by the condemnor. The filing of the declaration does not self-effect possession. It transfers title only—and defeasable title at that. *United States v. 44 Acres of Land*, 234 F. 2d 410, cert. denied 352 U.S. 116; *Travis v. United States*, 287 F. 2d 916, cert. denied 368 U.S. 824. The *United States v. Miller* opinion clearly states the purpose of the taking statute, at p. 381:

"The purpose of the statute is two-fold. First, to give the Government immediate possession of the property and to relieve it of the burden of interest accruing on the sum deposited from the date of taking to the date of judgment in the eminent domain proceeding. Secondly, to give the former owner, if his title is clear, immediate cash compensation to the extent of the Government's estimate and appropriately provides that, if the judgment ultimately awarded shall be in excess of the amount deposited, the owner shall recover the excess with interest."

There was no self-help or unilateral seizure by respondent here that deprived the appellants of their property without due process. No such seizure could occur without prior notice and without Court participation and supervision. In fact, as noted above, the seizure of the property was done pursuant to a judgment of the Court after notice and opportunity to be heard and after the Appellate Court refused to stay execution of the judgment. Section 555(2) of the Gen. Mun. Law was not the pulsating source of the acquisition of possession. The Court judgment was. Further, the Court of Appeals found it unnecessary to address itself to the validity of that statute which issue was pressed upon it by the appellants. It simply was not a factor in this case.

Thus, the statutory framework in this case is more immune to successful attack than was the valid Louisiana statute in *Mitchell v. W. T. Grant, supra*. That case distinguished the consumer-type cases because those cases lacked the due process safeguard present in *Mitchell*. Those safeguards are present here too.

POINT III

This appeal presents no substantial federal question, the question having been foreclosed by previous opinions and otherwise resting on adequate non-federal grounds.

The New York Court of Appeals decision at p. 2, enunciated the issue as being whether the appellants are entitled to a trial to determine whether the takings here serve a dominantly public purpose. That Court answered that question in the negative.

Impliedly and necessarily so, the Court in answering "no" to the question, said that the appellants raised no triable issue of fact and that respondent was entitled to summary judgment granting condemnation (CPLR Section 409(b)).

Thus the review of the merits must evolve around a demurrer to the petition and supporting papers, and whether that demurrer presents a substantial federal question reviewable by this Court.

The gravamen of appellants' contention appears to be that their constitutional right to due process has been violated because the property here was taken by respondent for a private purpose, that is, the expansion of the plant facilities of the Otis Elevator Company, a leading industrial employer in Yonkers, and further that this violation of their rights is not cured by receipt of adequate and just compensation.

The Court succinctly, but pointedly, disposed of appellants' argument (p. 3):

"Where, then, land is found to be substandard, its taking for urban renewal is for a public purpose, just as it would be if it were taken for a public park, public school or public street. The fact that the vehicle for renewed use of the land, once it is taken, may be a private agency, does not in and of itself change the permissible nature of the taking of the substandard property. Of course, if property has not been determined to be substandard in an urban renewal context, it may not be taken in eminent domain unless it is proved that its taking was for another public purpose and, if there was also a private benefit involved, that the public purpose was dominant.

Therefore, if we assume that the land here involved was substandard, as found by the Yonkers City Council and its Planning Board, it would be no defense to its condemnation that Otis openly expressed a desire to acquire it to assure its own continued economic viability in Yonkers. It would not then be necessary, as a precondition to the taking, to determine that the public benefit in assuring the retention of Otis as an increased source of employment opportunity in Yonkers was sufficient to outweigh the benefit that may be conferred on Otis.

For the same reasons, the fact that the Council's public hearings were held after the selection of Otis as sponsor rather than beforehand, or that the City openly and admittedly signed an agreement with Otis before the condemnation of the land, under the circumstances here, and especially in the light of Otis' ongoing economic importance to the community, must, at most, be regarded as mere irregularities cured by the fact that the hearings were actually held. It is also worth noting that, though presented with the

opportunity for disapproval, the bi-partisan City Council was unanimous in its vote for approval.

For the same reasons and on the same assumption that the area involved was substandard, it would be no defense that Otis had indicated it would leave Yonkers if suitable land was not found for its needed modernization and expansion, or that the condemned land was adjacent to Otis' existing facilities, or that the two sites it had earlier rejected, as either uneconomical or unsuitable, were not substandard. There is nothing inherently wrong in serving both the City's need for renewal of its substandard land and its desire to keep Otis in Yonkers at one and the same time. Nor is it remarkable that Otis would get the condemned land for a price which is but a fraction of that paid to the defendants and the other owners in condemnation."

What is left of appellants' argument after disposition by the Court of Appeals is merely a difference of opinion and an attack upon motives, neither of which can be pressed successfully.

Further, the law of New York is that even if the affected property were not substandard, nevertheless, condemnation of economically undeveloped property which is suffering from stagnation is cognizable as a public purpose. *Cannata v. City of New York*, 11 N.Y.2d 210. *Kaskel v. Impelliteri*, 306 N.Y. 73; *Berman v. Parker*, 348 U.S. 26; and pg. 3 of Court of Appeals decision here.

The respondent does not dispute that the question of what is a public purpose is ultimately a judicial one, and never did. However, respondent has shown all deliberate and valid acts supportive of a public purpose condemnation. Appellants have not disputed the sub-standard nature of the area. Appellants' brief and moving affidavit below

contain a crushing admission where at page 19 of the brief, addressed to the Appellate Division of the New York Supreme Court, they said:

"Defendants do not raise the question whether particular parcels are necessary to the plaintiff's purposes or whether particular parcels are 'slum' or 'sub-standard' . . ."

At page 4 of appellants' affidavit in support of the order to show cause, addressed to the Court, dated October 30, 1973, it is stated:

"The accomplishment of clearing the area of buildings denominated as substandard is ancillary to and subordinate to the principal purpose of granting this enormous benefit upon Otis. . . ."

They focus on the subsequent redevelopment by a private corporation, and thereby conclude it is not a public purpose. They agree with all the "physical facts" in the case, but they disagree with the motive of the respondent and City and wish to substitute their opinion on public purpose. This attack has been definitely rejected.

In the urban renewal statutes and under New York Law clearance of blighted areas is in itself a public purpose. See also 19 New York Juris, Section 13. More pointedly, the urban renewal statutes and cases specifically sanction, authorize and in fact encourage redevelopment by private persons. Section 501 of the Gen. Mun. Law, in defining the policy and purposes of the law, provides in part:

" . . . the undertaking of public and private improvement programs related thereto and the encouragement of *participation in these programs by private enterprise.*" (Italics added)

See also: N.Y. Constitution, Sections 2, 9 & 10 of Article 18, and General Municipal Law, Section 507.

The language in Judge Van Voorhis' opinion in *Kaskel, supra*, which was concurred in by the entire court is relevant here. He said:

"The slum area may be cleared, replanned, reconstructed and rehabited according to *any* design and for *any* purpose which renders the area no longer substandard or insanitary." (306 N.Y. p. 93) (Italics added)

The case of *Denihan Enterprises v. O'Dwyer*, 302 N.Y. 451, is the only case cited by appellants which procedurally called for a trial before the determination of public purpose. The case is clearly distinguishable from the instant case. The case involved a statute authorizing municipal construction of parking garages which would be strictly limited to *public* parking. Thus, the re-use of the condemned land was of central importance to the legality of the taking. If the garage was to be for private parking, then the taking is illegal. In *Denihan*, the statute required a focusing on the ultimate re-use mandating that it be public, to be legal. There is no such requirement in the statutes quoted above.

Thus, we are left with a reasoned and publicly announced and heard determination by a bi-partisan unanimous City Council, which is entitled to great weight.

See:

Amalgamated Housing Corp. v. Kelly, 193 Misc. 961 (N.Y.);
Matter of Murray v. LaGuardia, 291 N.Y. 320;
Matter of New York City Housing Authority v. Muller, 270 N.Y. 333.

The Courts will accept as fact that which is expressed in an act or ordinance to be the legislative purpose, unless from the face of the act or ordinance or from facts which

may be judicially noticed, it is made to appear that the taking is not for the expressed purpose.

See:

McCabe v. City of New York, 213 N.Y. 468;
City of Utica v. Damiano, 20 Misc. 2d 804 (N.Y.);
Culgar v. Power Authority of State of New York, 4 Misc. 2d 879 (N.Y.).

Secondly, we are given the gratuitous statement by appellants that they do not raise the question of whether the property is slum or substandard, *supra*.

Thirdly, we are pressed with the argument of after-use as being the "dominant" purpose of the taking. Under New York law such dichotomy of purpose when land is taken because it is substandard or economically stagnated is inappropriate and "untenable".

Thus the Court of Appeals did not make itself the "paper shield" or "rubber stamp" of anyone's improper conduct. In the closing paragraph of its opinion, it crystallized the defect in appellants' argument where it stated that they subordinated a valid issue, substandardness, i.e. acknowledging that that issue is not raised, under an untenable contention, to wit, the giving of the property to Otis after the slum clearance.

Thus, under New York Law, the within taking, even without a trial, was proper.

In light of the law of the State of New York as announced by the Court of Appeals, the final arbiter of New York Law (*Scripto Inc. v. Carson*, 362 U.S. 207, 4 L.Ed.2d 660), and the question or issue pressed here by appellants, it is clear that there is no substantial federal question of which this Court should take cognizance. It is acknowledged that whether there is such a question is for this Court to determine. (*Angel v. Bullington*, 330 U.S. 183, 91 L.Ed. 832). Even if a federal question is pre-

sented, it must (1) be substantial; (2) be not merely formal; (3) not be devoid of merit so as to be frivolous; (4) not be foreclosed by prior decisions of this Court so as not to present a real controversy; and (5) not be supportable on adequate non-federal grounds.

See:

Equitable Life Assurance Society v. Brown, 187 U.S. 308 47 L.Ed. 190;
McNulty v. California, 149 U.S. 645, 37 L.Ed. 882;
Wilson v. No. Carolina, 109 U.S. 586;
Heiter v. United States, 260 U.S. 438, 67 L.Ed. 338.

If the highest Court of the State has acted in accord with the laws and procedures of that State, then only in very exceptional circumstances will this Court justifiably find a denial of due process, i.e. a substantial federal question. The Court must find that these appellants have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of a citizen. It is not sufficient that this Supreme Court would have followed a different course than that followed by the New York Court of Appeals. That is not the test. That the Supreme Court may share appellants' complaint that condemned property should not be given to private enterprise, after slum clearance, because it leads to socialism or communism (p. 72, appellants' brief to the Court of Appeals), does not justify interference by this Court in the internal judicial and legislative workings of a sovereign state. (*Hovey v. Elliott*, 167 U.S. 409; *Wilson, supra.*) The Supreme Court corrects constitutionally wrong judgments, it does not revise decisions or give advisory opinions. (*Herb v. Pitcairn*, 324 U.S. 217, 89 L.Ed. 789.)

If the decision below rests on an adequate state, non-federal, grounds, there can be no review by this Court.

See:

Murdock v. Memphis, 20 Wall 590, 22 L.Ed. 429;
Johnson v. New Jersey, 384 U.S. 719, 16 L.Ed.2d 882.

Even if the state court decided the case on both federal and state questions, there will be no review if decision of the federal question was unnecessary because of the disposition of the state question. (*Jankovich v. Indiana Toll Road Commis.*, 379 U.S. 487, 13 L.Ed.2d 439.)

A review of the decision of the New York Court of Appeals reveals no determination by it of the constitutionality of Section 555(2) of the General Municipal Law. Such a determination was not necessary. The "taking" did not occur by virtue of that Section. It occurred as a result of a judgment of condemnation after notice and opportunity to be heard were afforded these appellants. Thus, whether that statute on its face or as applied violated constitutional due process is of no relevancy in deciding this case. Even if the constitutionality of that statute were necessary for a decision below, that issue has already been decided, definitively by prior decisions of this Court involving markedly similar statutes (*United States v. Miller, supra*, etc.). Appellants are asking this Court to decide again a federal question already decided and settled. Moreover, since there is no dispute that appellants were not otherwise deprived of procedural due process, the decision of the New York Court of Appeals can be clearly seen as resting on state grounds only, or if you will, on no substantial federal ground.

Aside from the validity of the attacked statute, the summary disposition of the case without a "pre-appropriation" hearing falls clearly within the constitutional boundaries of due process. The prior decisions of this Court have sanctioned less stringent summary procedures. (*Mitchell v. W.T. Grant Company, supra*; *Ownbay v. Morgan*, 256

U.S. 94.) The *Ownbay* decision survived the *Fuentes* decision and is reinvigorated by *Mitchell*. Thus, the constitutional validity of the summary procedure utilized here, or in every litigated case where no issue of fact is raised, is well established and its re-review by this Court is not justified. The prior decisions of this Court tell us that it cannot invalidate summary judgment proceedings, as appellants ask. Such a reversal would send us back to the dark ages of due process. The entire statutory framework of our State and Nation, and in fact the civilized world, is replete with summary disposition of property, under due process, without pre-appropriation hearings.

Further, the prior decisions of this Court on jurisdiction in eminent domain cases, discussed above, have so foreclosed the issue now presented as to make this appeal not only devoid of controversy, but frivolous. The Court of Appeals said as much at p. 9 of its decision:

" . . . owner seek not, in effect, the retention of their properties, but the wreaking of some kind of vengeance on the city".

There is no substantial federal question presented, not already decided, the constitutional validity of slum clearance itself being a specie of public purpose. There is just no room for appellants' argument that the salvation of the Otis Elevator Co. was the dominant and motivating force behind this condemnation. There is no state or federal ground to support that argument, absent fraud, corruption or a false finding of slum and stagnating conditions. None of these issues were raised by appellants and they do not raise them here.

CONCLUSION

The appeal should be dismissed and/or the decision of the New York Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

The purpose of this appendix is to provide a summary of the data collected during the field study. The data are presented in a tabular format, with each row representing a different subject and each column representing a different variable.

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APPENDIX

Section 555, General Municipal Law.

§ 555. Acquisition of property.—1. (a) Real property or any interest therein, *including but not limited to air rights, and easements or other rights of user necessary for the use and development of such air rights, to be developed as air rights sites for the elimination of the blighting influences over an area or areas consisting principally of land in streets, alleys, highways, and other public rights of way, railway or subway tracks, bridge or tunnel approaches or entrances, or other similar facilities which have a blighting influence on the surrounding area* necessary for or incidental to any urban renewal program or part thereof in accordance with an urban renewal plan may be acquired by an agency by gift, devise, purchase, condemnation or otherwise and by a municipality for and on behalf of an agency by condemnation. Property may be acquired by condemnation by an agency or by a municipality for an agency pursuant to the condemnation law or pursuant to the laws relating to the condemnation of land by the municipality for which the agency is acting or the municipality, as the case may be.

(b) Property so acquired by an agency, or by a municipality in behalf of an agency, shall be exempt from taxation until sold, leased for a term not exceeding ninety-nine years or otherwise disposed of in accordance with the provisions of this article or article fifteen of this chapter; provided, however, that any such agency shall have the power and authority, with respect to such property, to pay, out of funds available to it for the effectuating of such urban renewal program, annual sums in lieu of taxes to any taxing jurisdiction providing services to the urban renewal area, or to the part or portion thereof within such taxing jurisdiction, in order that no such taxing jurisdiction shall suffer an inequitable loss of revenue by virtue of such urban renewal program; provided, further, that the

amount so paid for any year with respect to any such property shall not exceed the lesser of (1) the sum last levied for the benefit of such taxing jurisdiction as an annual tax on such property prior to the time of its acquisition for urban renewal purposes or (2) such amount as shall be approved by the commissioner, pursuant to such rules, regulation, limitations and conditions as he may prescribe, as an eligible and proper charge against such urban renewal program. Upon the sale, lease or disposition of such property to any person, firm or corporation not entitled to an exemption from taxation or entitled to *only* a partial tax exemption such property shall immediately become subject to taxation in whole or in part, as the case may be, and shall be taxed pro rata for the unexpired portion of the taxable year.

As used in this paragraph, the term "taxing jurisdiction" means any municipal corporation or district corporation including any school district or any special district, having the power to levy or collect taxes and benefit assessments upon real property, or in whose behalf such taxes or benefit assessments may be levied or collected.

(c) Notwithstanding any other provisions of this article, an agency may acquire by purchase, gift, devise, condemnation or otherwise, in accordance with the appropriate provisions of any general, special or local law or charter applicable to the acquisition of real property by such agency, such real property or any interest therein, within an area designated pursuant to *article fifteen of this chapter* as appropriate for urban renewal, as it may deem ultimately necessary or proper to effectuate the purposes of this article although temporarily not required for such purposes provided that the early acquisition of such property is approved as follows:

(1) In a municipality where there is a planning commission, the agency shall submit the proposal for early acquisition to the commission for its approval. Such planning

commission shall, not later than ten weeks from the date of the referral of the proposal to it, after a public hearing held on due notice, submit its report to the *'governing body'* certifying its unqualified consent, its disapproval, or its qualified consent with recommendations for modifications of the proposal.

After public hearing held on due notice after the report is received or due from the planning commission, the *'governing body'* may:

(i) if the commission shall have certified its unqualified consent, *by majority vote authorize the agency to proceed with the acquisition;*

(ii) if the commission shall have certified its disapproval or shall have failed to make its report within ten weeks from the date such proposal was submitted to it, *nevertheless authorize the agency to proceed with the acquisition, but only by a three-fourths vote;*

(iii) if the commission shall have certified its qualified consent together with recommendations for modifications of the proposal, *authorize the agency to proceed with the acquisition in accordance with the modifications recommended by the commission, by majority vote, or authorize such acquisition without such modifications but only by a three-fourths vote.*

(2) In a municipality where there is no planning commission, the agency *'shall submit the proposal to the governing body which after public hearing held on due notice, may either approve or disapprove the proposal.'*

2. Notwithstanding the provisions of any general, special or local *law* or charter *provision* applicable to the acquisition of real property by condemnation, in any condemnation proceeding brought by an agency or a municipality for and on behalf of an agency to acquire property in an urban renewal area² the agency or the municipality may file, at any time before judgment a declaration by the petitioner

that the property described in the petition is being taken in connection with the carrying out of an urban renewal program. Such declaration shall include or have annexed a statement of the authorization for the taking, a description of the property sufficient to identify same, and a statement of the sum of money estimated to be just compensation for the property being taken. Upon filing such declaration and the deposit, in the court in which the proceeding is pending, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in such declaration, title in fee simple to such property shall vest in the petitioner and the right to just compensation shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of six per centum per annum to the date of payment on the amount finally awarded as the value of the property; but interest shall not be allowed on so much thereof as shall have been paid into court. No sum so paid into court shall be charged with commissions or poundage.³

(Added, L 1972)

Upon the application of the parties in interest, the court may order that money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said property, or any parcel thereof, shall exceed the amount of money so received by any person entitled thereto, the court shall enter judgment against the agency or municipality for the amount of the deficiency.

(Added, L 1972)

Upon the filing of a declaration of taking, the court shall have the power to fix the time within which and the terms upon which the parties in possession shall be re-

quired to surrender possession. The court shall have the power to make such orders in respect to encumbrances, liens, rents, taxes, assessments, insurance and other charges, if any, as shall be just and equitable.

Section 501, General Municipal Law.

§ 501. Policy and purposes of article.—There exist in many municipalities within this state residential, non-residential, commercial, industrial or vacant areas, and combinations thereof, which are slum or blighted, or which are becoming slum or blighted areas because of substandard, insanitary, deteriorated or deteriorating conditions, factors, and characteristics, with or without tangible physical blight. The existence of such areas constitutes a serious and growing menace, is injurious to the public safety, health, morals and welfare, contributes increasingly to the spread of crime, juvenile delinquency and disease, necessitates excessive and disproportionate expenditures of public funds for all forms of public service and constitutes a negative influence on adjacent properties impairing their economic soundness and stability, thereby threatening the source of public revenues.

In order to protect and promote the safety, health, morals and welfare of the people of the state and to promote the sound growth and development of our municipalities, it is necessary to correct such substandard, insanitary, blighted, deteriorated or deteriorating conditions, factors and characteristics by the clearance, replanning, reconstruction, redevelopment, rehabilitation, restoration or conservation of such areas, the undertaking of public and private improvement programs related thereto and the encouragement of participation in these programs by private enterprise.

It is necessary for the accomplishment of such purposes to grant municipalities of this state the rights and powers

provided in this article. The use of such rights and powers to correct such conditions, factors and characteristics and to eliminate or prevent the development and spread of deterioration and blight through the clearance, re-planning, reconstruction, rehabilitation, conservation or renewal of such areas, for residential, commercial, industrial, community, public and other uses is a public use and public purpose essential to the public interest, and for which public funds may be expended.

Section 507, General Municipal Law.

§ 507. **Disposition of property.**—1. In addition to employing any other lawful method of utilizing or disposing of any real property, and appurtenances thereto or any interest therein owned by a municipality or acquired by it pursuant to section five hundred six of this article, a municipality may sell, lease for a term not exceeding ninety-nine years, or otherwise dispose of any such real property and appurtenances thereto, to any person, firm or corporation at the highest marketable price or rental at public auction or by sealed bids pursuant to the provisions of any general, special or local laws applicable to the sale or disposition of real property by said municipality.

2. Notwithstanding anything to the contrary contained in this article and notwithstanding the provisions of any general, special or local law applicable to the sale of real property by a municipality, such real property and appurtenances thereto may be sold, leased for a term not exceeding ninety-nine years or otherwise disposed of for the effectuation of any of the purposes of the urban renewal program in accordance with the urban renewal plan:

(a) to any limited profit housing company organized pursuant to the provisions of article two of the private housing finance law without public auction or sealed bids;

(b) to any limited dividend housing company organized pursuant to article four of the private housing finance law or redevelopment company organized pursuant to article five of the private housing finance law, without public auction or sealed bids provided that notice of such sale, lease or other disposition is published and a public hearing is held before the governing body not less than ten days after such publication;

(c) to any person, firm or corporation designated by the agency and approved by the governing body as a qualified and eligible sponsor in accordance with established rules and procedures prescribed by the agency, provided that (1) the agency has published, in at least one newspaper of general circulation in the municipality at least ten days prior to such sale, lease or other disposition, a notice which shall include a statement of the identity of the proposed sponsor and of his proposed use or reuse of the urban renewal area or of the applicable portion thereof; such notice shall be in such form and manner as may be prescribed by the agency and, in the case of projects aided by a state loan, periodic subsidy or capital grant or in which application has been made for such loan, subsidy or grant, as approved by the commissioner; (2) such proposed sponsor agrees to pay the minimum price or rental fixed by the agency for such real property; (3) such proposed sponsor matches any bid higher than the said minimum price or rental, and (4) such sale, lease or other disposition shall require effectuation of the purpose thereof within a definite and reasonable period of time. In the event that such qualified and eligible sponsor does not agree to pay the minimum price or rental fixed by the agency or fails to match any higher bid than such minimum price or rental, a municipality may, in its sole discretion and only if consistent with the urban renewal plan, sell or lease for a term not exceeding ninety-nine years any such real property and appurtenances thereto, to any person, firm or corporation,

the property acquired from such person, firm or corporation or substantially equivalent property within the urban renewal area, provided that such former owner (1) agrees to pay the said minimum price or rental and (2) matches any higher bid than said minimum price or rental, and

(d) to any person, firm or corporation designated by the agency as a qualified and eligible sponsor pursuant to the provisions of clause (1) of subsection (c) of this subdivision without public auction or sealed bids, provided that (1) the price or rental to be paid by such sponsor for such property and all other essential terms and conditions of such sale, lease or other disposition shall be included in the notice published by the agency pursuant to the said clause (1) of subsection (c) of this subdivision, (2) that such sale, lease or other disposition be approved by the governing body after a public hearing held not less than ten days after the publication of such notice, and (3) such sale, lease or other disposition shall, in the case of projects aided by a state loan, periodic subsidy or capital grant or in which application has been made for such loan, subsidy or grant, be approved by the commissioner.

(e) for the effectuation of any of the purposes of the urban renewal program and in accordance with the urban renewal plan, a municipality may grant, sell, convey or lease, without public hearing or public letting, to a public utility subject to the jurisdiction of the public service commission, for construction and maintenance of public utility systems, and the conduct and operation thereof, for such length of time as it may deem advisable, franchises, easements or rights of way, in, over, below, along or across any lands acquired by the municipality pursuant to this article, upon such terms and conditions, for such consideration and subject to such restrictions as in the judgment of its governing body shall seem proper, provided, the governing body shall first determine that the use and enjoyment for

such purposes of such lands is not inconsistent with the purposes and provisions of the urban renewal plan.

3. Any deed, lease or instrument by which real property and appurtenances thereto, or any interest therein is conveyed or disposed of pursuant to this section shall contain provisions requiring the purchaser, lessee or grantee to re-plan, clear, rehabilitate, restore, renew, conserve, improve, reconstruct or redevelop such property in accordance with the urban renewal plan as approved by the governing body and within a definite and reasonable period of time subject to the terms of the contract relating thereto between the municipality and the sponsor, and provisions insuring the use of such real property for purposes consistent with such urban renewal plan.

Article 1, Section 7, New York State Constitution.

§ 7. [Compensation for taking private property; private roads; drainage of agricultural lands, excess condemnation.]—(a) Private property shall not be taken for public use without just compensation.

(b) [Repealed]

(c) Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road and the amount of all damage to be sustained by the opening thereof shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceedings, shall be paid by the person to be benefited.

(d) The use of property for the drainage of swamp or agricultural lands is declared to be a public use, and general laws may be passed permitting the owners or occupants of swamp or agricultural lands to construct and maintain for the drainage thereof, necessary drains, ditches and dykes upon the lands of others, under proper

restrictions, on making just compensation, and such compensation, together with the cost of such drainage may be assessed, wholly or partly, against any property benefited thereby; but no special laws shall be enacted for such purposes.

(e) [Repealed]

Article 18, Section 2, New York State Constitution.

Art XVIII § 2

§ 2. [Idem; powers of legislature in aid of.]—For and in aid of such purposes, notwithstanding any provision in any other article of this constitution, but subject to the limitations contained in this article, the legislature may: make or contract to make or authorize to be made or contracted capital or periodic subsidies by the state to any city, town, village, or public corporation, payable only with moneys appropriated therefor from the general fund of the state; authorize any city, town or village to make or contract to make such subsidies to any public corporation, payable only with moneys locally appropriated therefor from the general or other fund available for current expenses of such municipality; authorize the contracting of indebtedness for the purpose of providing moneys out of which it may make or contract to make or authorize to be made or contracted loans by the state to any city, town, village or public corporation; authorize any city, town or village to make or contract to make loans to any public corporation; authorize any city, town or village to guarantee the principal of an interest on, or only the interest on, indebtedness contracted by a public corporation; authorize and provide for loans by the state and authorize loans by any city, town or village to or in aid of corporations regulated by law as to rents, profits, dividends and disposition of their property or franchises and engaged in providing housing facilities or nursing home accommoda-

tions; authorize any city, town or village to make loans to the owners of existing multiple dwellings for the rehabilitation and improvement thereof for occupancy by persons of low income as defined by law; grant or authorize tax exemptions in whole or in part, except that no such exemption may be granted or authorized for a period of more than sixty years; authorize cooperation with and the acceptance of aid from the United States; grant the power of eminent domain to any city, town or village, to any public corporation and to any corporation regulated by law as to rents, profits, dividends and disposition of its property or franchises and engaged in providing housing facilities.

As used in this article, the term "public corporation" shall mean any corporate governmental agency (except a county or municipal corporation) organized pursuant to law to accomplish any or all of the purposes specified in this article.

Article 18, Sections 9 and 10, New York State Constitution.

§ 9. [Acquisition of property for purposes of article.]—Subject to any limitation imposed by the legislature, the state, or any city, town, village or public corporation, may acquire by purchase, gift, eminent domain or otherwise, such property as it may deem ultimately necessary or proper to effectuate the purposes of this article, or any of them, although temporarily not required for such purposes.

§ 10. [Power of legislature; construction of article.]—The legislature is empowered to make all laws which it shall deem necessary and proper for carrying into execution the foregoing powers. This article shall be construed as extending powers which otherwise might be limited by other articles of this constitution and shall not be construed as imposing additional limitations, but nothing in

this article contained shall be deemed to authorize or empower the state, or any city, town, village or public corporation, to engage in any private business or enterprise other than the building and operation of low rent dwelling houses for persons of low income as defined by law, or the loaning of money to owners of existing multiple dwellings as herein provided.

Section 4, Condemnation Law of the State of New York.

§ 4. Petition to supreme or county court; what to contain.

The proceeding shall be instituted by the presentation of a petition by the plaintiff to the county court of the county in which the property is situated or to a special term of the supreme court, held in the judicial district in which the property is located setting forth the following facts:

1. His name, place of residence, and the business in which engaged; if a corporation, co-operative corporation or joint-stock association, whether foreign or domestic, its principal place of business within the state, the names and places of residence of its principal officers, and of its directors, trustees or board of managers, as the case may be, and the object or purpose of its incorporation or association; if a political division of the state, the names and places of residence of its principal officers; and if the state, or any commission or board of managers or trustees in charge or having control of any of the charitable or other institutions of the state, the name, place of residence of the officer acting in its or their behalf in the proceedings.

2. A specific description of the property to be condemned, and its location, by metes and bounds, with reasonable certainty.

3. The public use for which the property is required and either:

- a. a concise statement of the facts showing the necessity of its acquisition for such use, or,

- b. if the property is to be used for the construction of a major utility transmission facility as defined in section one hundred twenty or major steam electric generating facility as defined in section one hundred forty of the public service law with respect to which a certificate of environmental compatibility and public need has been issued under such law, a statement that such certificate relating to such property has been issued and is in force.

3. The public use for which the property is required and a concise statement of the facts showing the necessity of its acquisition for such use.

4. The names and places of residence of the owners of the property; if an infant, the name and place of residence of his general guardian, if he has one; if not, the name and place of residence of the person with whom he resides; if a lunatic, idiot, or habitual drunkard, the name and place of residence of his committee or trustee, if he has one; if not, the name and place of residence of the person with whom he resides. If a non-resident, having an agent or attorney residing in the state authorized to contract for the sale of the property, the name and place of residence of such agent or attorney; if the name or place of residence of any owner cannot after diligent inquiry be ascertained, it may be so stated with a specific statement of the extent of the inquiry which has been made.

5. That the plaintiff has been unable to agree with the owner of the property for its purchase, and the reason of such inability.

6. The value of the property to be condemned.

7. A statement that it is the intention of the plaintiff, in good faith, to complete the work or improvement, for which the property is to be condemned; and that all the preliminary steps required by law have been taken to entitle him to institute the proceedings.

8. A demand for relief, that it may be adjudged that the public use requires the condemnation of the real property described, and that the plaintiff is entitled to take and hold such property for the public use specified, upon making compensation therefor, and that commissioners of appraisal be appointed to ascertain the compensation to be made to the owners for the property so taken.

Sections 5 and 6, Condemnation Law of the State of New York.

§ 5. **Notice to be annexed to petition; service.**—There must be annexed to the petition a notice of the time and place at which it will be presented to a term of the county court of the county in which the property is situated or to a special term of the supreme court, held in the judicial district where the property or some portion of it is situated, and a copy of the petition and notice must be served upon all the owners of the property at least eight days prior to its presentation.

§ 6. **Service of petition and notice.**—Service of the petition and notice must be made in the same manner as the service of a summons in an action in the supreme court is required to be made, and all the provisions of article twenty-five of the civil practice act which relate to the service of a summons, either personally or in any other way, and the mode of proving service, shall apply to the service of the petition and notice, except that in a proceed-

ing in which publication is made in newspapers there may be attached to the notice in lieu of the petition, a statement of the object of the proceeding and a brief description of the real property sought to be acquired. If the defendant has an agent or attorney residing in this state, authorized to contract for the sale of the real property described in the petition, service upon such agent or attorney will be sufficient service upon such defendant. In case the defendant is an infant of the age of fourteen years or upwards, a copy of the petition and notice shall also be served upon his general guardian, if he has one; if not, upon the person with whom he resides.

Section 11, Condemnation Law of the State of New York.

§ 11. **Trial of issues.**—The court shall try any issue raised by the petition and answer at such time and place as it may direct, or it may order the same to be referred to a referee to hear and determine, and upon such trial the court or referee shall file a decision in writing, or deliver the same to the attorney for the prevailing party, within twenty days after the final submission of the proofs and allegations of the parties, and the provisions of the civil practice act relating to the form and contents of decisions upon the trial of issues of fact by the court or a referee, and to making and filing exceptions thereto, and the making and settlement of a case for the review thereof upon appeal, and to the proceedings which may be had in case such decision is not filed or delivered within the time herein required, and to the powers of the court and referee upon such trial, shall be applicable to a trial and decision under this chapter.

Section 26, Condemnation Law of the State of New York.

§ 26. Power of court to make necessary orders.—In all proceedings under this chapter, where the mode or manner of conducting all or any of the proceedings therein is not expressly provided for by law, the court before whom such proceedings may be pending, shall have the power to make all necessary orders and give necessary directions to carry into effect the object and intent of this chapter, and of the several acts conferring authority to condemn lands for public use, and the practice in such cases shall conform, as near as may be, to the ordinary practice in such court.

Rule 409, New York Civil Practice Law and Rules.

Rule 409. Hearing.

(a) **Furnishing of papers; filing.** Upon the hearing, each party shall furnish to the court all papers served by him. The petitioner shall furnish all other papers not already in the possession of the court necessary to the consideration of the questions involved. Where such papers are in the possession of an adverse party, they shall be produced by such party at the hearing on notice served with the petition. The court may require the submission of additional proof. All papers furnished to the court shall be filed unless the court orders otherwise.

(b) **Summary determination.** The court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised. The court may make any orders permitted on a motion for summary judgment.

Supreme Court, U. S.

FILED

NOV 12 1975

IN THE

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1975.

No. **75-542**

Parcel I.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,
against

WILLIAM T. MORRIS, JR., MARY BERENICE McCALL, THOMAS
Q. MORRIS, M. D., FINECAP REALTY COMPANY, a partner-
ship, LINCOLN SAVINGS BANK OF BROOKLYN,
Defendants,

Relative to acquiring certain real property situate in the City of
Yonkers, County of Westchester, State of New York.

Parcel II.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,
against

DAB-O-MATIC CORP. and GAZETTE PRESS, INC.,
Defendants-Appellants,
and

WILLIAM T. MORRIS, JR., MARY BERENICE McCALL, THOMAS
Q. MORRIS, M. D., FINECAP REALTY COMPANY, a partner-
ship, LINCOLN SAVINGS BANK OF BROOKLYN, CLOVER
WIRE FORMING CO., INC., WOODHAVEN DRESS CO., INC.,
Defendants,

Relative to acquiring certain real property situate in the City of
Yonkers, County of Westchester, State of New York.

Index No. 7296/73.

Parcel III.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,
against

WILLIAM T. MORRIS, JR., MARY BERENICE McCALL, THOMAS
Q. MORRIS, M. D., FINECAP REALTY COMPANY, a partner-
ship, LINCOLN SAVINGS BANK OF BROOKLYN, JOHN
JOHNSON, J. BEST, S. WATLINGTON and RICHARD R.
EARLS,
Defendants,

Relative to acquiring certain real property situate in the City of
Yonkers, County of Westchester, State of New York.

(Continued on Back of Cover)

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,
against

LESTER WEINBERG, individually and doing business as
GREAT EASTERN METAL PRODUCTS Co.,
Defendant-Appellant,

Relative to acquiring certain real property situate in the City of
Yonkers, County of Westchester, State of New York.

Index No. 7357/73.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,
against

MARY BARCA as executrix of the Last Will and Testament of
THOMAS BARCA, NANCY BARCA and ANGELO BARCA, JR.,
all doing business as BARCA BROS.,
Defendants-Appellants,
and

The COUNTY TRUST COMPANY as Executor under the Last Will
and Testament of MAITLAND BREHOUSE, deceased,
Defendant,

Relative to acquiring certain real property situate in the City of
Yonkers, County of Westchester, State of New York.

Index No. 7326/73.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

**Appellants' Brief Opposing Motion to Dismiss and to
Affirm.**

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WEKSTEIN, FRIEDMAN & FULFREE,
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IN THE
Supreme Court of the United States

October Term, 1975.

No. .

Parcel I.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,

against

WILLIAM T. MORRIS, JR., MARY BERENICE MCCALL, THOMAS
Q. MORRIS, M. D., FINECAP REALTY COMPANY, a partner-
ship, LINCOLN SAVINGS BANK OF BROOKLYN,

Defendants,

Relative to acquiring certain real property situate in the
City of Yonkers, County of Westchester, State of New
York.

Parcel II.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,

against

DAB-O-MATIC CORP. and GAZETTE PRESS, INC.,
Defendants-Appellants,

and

WILLIAM T. MORRIS, JR., MARY BERENICE MCCALL, THOMAS
Q. MORRIS, M. D., FINECAP REALTY COMPANY, a partner-
ship, LINCOLN SAVINGS BANK OF BROOKLYN, CLOVER WIRE
FORMING CO., INC., WOODHAVEN DRESS CO., INC.,

Defendants,

Relative to acquiring certain real property situate in the
City of Yonkers, County of Westchester, State of New
York.

Index No. 7296/73.

Parcel III.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,

against

WILLIAM T. MORRIS, Jr., MARY BERENICE MCCALL, THOMAS
 Q. MORRIS, M. D., FINECAP REALTY COMPANY, a partner-
 ship, LINCOLN SAVINGS BANK OF BROOKLYN, JOHN JOHN-
 SON, J. BEST, S. WATLINGTON and RICHARD R. EARLS,

Defendants,

Relative to acquiring certain real property situate in the
 City of Yonkers, County of Westchester, State of New
 York.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,

against

LESTER WEINBERG, individually and doing business as
 Great Eastern Metal Products Co.,

Defendant-Appellant,

Relative to acquiring certain real property situate in the
 City of Yonkers, County of Westchester, State of New
 York.

Index No. 7357/73.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,

against

MARY BARCA as executrix of the Last Will and Testament
 of Thomas Barca, NANCY BARCA and ANGELO BARCA, Jr.,
 all doing business as Barca Bros.,

Defendants-Appellants,

and

THE COUNTY TRUST COMPANY as Executor under the
 Last Will and Testament of Maitland Brenhouse, de-
 ceased,

Defendant,

Relative to acquiring certain real property situate in the
 City of Yonkers, County of Westchester, State of New
 York.

Index No. 7326/73.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF
 NEW YORK.

**Appellants' Brief Opposing Motion to Dismiss and to
 Affirm.**

POINT I.

The payments to the defendants for fixtures and for moving expenses are matters foreign to the present appeal.

On page 3 of plaintiff's brief there is recited an account of payments made to various defendants for moving expenses, for fixtures, and withdrawal of moneys deposited by the plaintiffs.

Moving expenses are granted by administrative fiat and are not part of any claim which can be advanced in a condemnation proceeding. Except for a possible proceeding in the nature of mandamus (not here present) moving expenses are never litigated in court.

More important, all of the payments recited on page 3 of plaintiff's brief were made after stipulations were entered by all parties to the effect that all such payments should be made by the plaintiff and received by the defendants without prejudice to the rights of the defendants to pursue their contention that the takings were constitutionally prohibited, throughout the entire appellate process.

POINT II.

The order of the New York Court of Appeals is final.

At page 37 of defendants' jurisdictional statement there were discussed the case of *Catlin v. United States*, 324 U. S. 229, and reasons why as to the defendants who were fee owners (Barca and Weinberg) the present appeal is not premature. Point I of plaintiff's brief frames this issue on the question of whether the Court of Appeals'

order is final. Immediately there arises the matter of the defendants who were (or are) the holders of long term leases (Dab-O-Matic Corp. and Gazette Press, Inc.). As to them the Court of Appeals' order is as final as any order or judgment can ever be final. If the takings in eminent domain are indeed constitutional, as the Court of Appeals has found, the right of these lessees to the remainder of their terms has been cut off by the terms of their leases, as has their right to compensation. Thus there is no further avenue open to them, and as to them the litigation is now concluded. No hearing on the subject of compensation will ever be held as to them, since under the Court of Appeals' order they are deprived of compensation as a matter of law. Unless there is an appeal to this court, the matter is finally and forever concluded as to them.

If, on the other hand, it is ultimately determined that the instant taking was unconstitutional, then the unexpired terms of the leases did not cease and determine, and the tenants were unlawfully ousted of their right to possession by the plaintiff. In such case the taking was tortious, and the tenant defendants are entitled to damages for the loss of use and occupation of their respective premises, plus consequential damages. Such damages are recoverable in New York in the instant proceeding.

§24 of the New York State Condemnation Law provides as follows:

"§24. Temporary possession pending proceedings

"When it appears to the satisfaction of the court at any stage of proceedings that the public interests will be prejudiced by delay, it may direct that the plaintiff be permitted to enter immediately upon the real property to be taken, and devote it temporarily to the public use specified in the peti-

tion, upon the deposit with the court of a sum to be fixed by the court upon a notice to the parties of not less than eight days and such sum when so fixed and paid shall be applied, so far as it may be made, with interest thereon from the date of the entry of the petitioner upon such real property, and the costs and expenses of the proceeding, and the residue, if any, returned to the plaintiff, and, in case the petition should be dismissed, or no award should be made, or the proceedings should be abandoned by the plaintiff, the court shall direct that the money so deposited, so far as it may be necessary, shall be applied to the payment of any damages which the defendant may have sustained by such entry upon and use of his property, and his costs and expenses of the proceedings, such damages to be ascertained by the court, or a referee to be appointed for that purpose, and if the sum so deposited shall be insufficient to pay such damages, and all costs and expenses awarded to the defendant, judgment shall be entered against the plaintiff for the deficiency, to be enforced and collected in the same manner as a judgment in the Supreme Court; and the possession of the property shall be restored to the defendant. As amended L. 1923, c. 246, eff. April 19, 1923."

If the existing order of the Court of Appeals remains undisturbed, the defendants, who are tenants, are deprived of any recourse in this proceeding or any other action or proceeding.

CONCLUSION.

For the foregoing reasons and those exposed in defendants' jurisdictional statement, probable jurisdiction should be noted.

Respectfully submitted,

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